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NOTES OF RECENT CASES

The Chief Justice and Mockett, J. National Insurance Company Ltd.
28th April, 1941. *v.* Visweswara Rao and another.
O.S.A. No. 23 of 1940.

Interest—Loan on a mortgage of lands and a life insurance policy—Nine per cent. per annum compound interest with quarterly rests—Whether too high.

An insurance company advanced a sum of Rs. 6,000 secured by a mortgage of certain lands and a policy of insurance on the life of the mortgagor. The contract stipulated that interest should be at 9 per cent. per annum compound with quarterly rests. The suit on the mortgage was not defended. The trial Judge (*Somayya, J.*) refused to allow more than $6\frac{1}{4}$ per cent. compound interest. On appeal,

Held, that nine per cent. compound interest was not so high as to justify the Court in reducing it especially when the borrower did not complain.

S. Parthasarathy and *V. K. Tiruvenkatachari* for Appellant.

Respondent not represented.

K.S.

The Chief Justice and Mockett, J. Venkayya *v.* Raghavamma.
29th April, 1941. **A.A.A. O. No. 261 of 1940.**

Husband and wife—Decree for maintenance in favour of wife—Executability of, after subsequent cohabitation—Civil Procedure Code (V of 1908), O. 21, r. 2—Discharge of decree—Provisions for—Applicability.

Though a Hindu wife may not sue for judicial separation she can if she is compelled to live apart sue for and obtain a decree directing her husband to maintain her. A decree obtained by a Hindu wife against her husband for maintenance differs in no important respect from an order for permanent alimony embodied in a decree for judicial separation. Where the wife resumes cohabitation after obtaining the maintenance decree, the decree is annulled by reason of the subsequent resumption of cohabitation and therefore the wife cannot execute the decree.

English and Indian authorities reviewed.

Haddon v. *Haddon,* L. R. 18 Q.B.D. 778, applied. I.L.R. 2 Rang. 163, followed.

It is not a question of procedure or adjustment or satisfaction of the decree. The question is whether the Court is to enforce a decree the basis of which has, by the action of the parties themselves, been demolished.

A. Lakshmayya for Appellant.

K. Kotayya for Respondent.

K.S.

Pandrang Row, J. Rajammal *v.* Chakrapani Chetti.
2nd May, 1941. **C.R.P. No. 1153 of 1940.**

Jurisdiction—Suit for declaration that mortgage document is void and not binding on plaintiff—Value for purposes of jurisdiction.

In a suit for a declaration that a mortgage is not binding, there is no reason why a different valuation should be adopted for jurisdiction from what would be adopted in a suit for cancellation. The face value alone of the document should be taken as the value and the fact that interest has accrued, increasing the amount due under the document is immaterial.

C. Padmanabha Aiyangar for Petitioner.

M. S. Venkatarama Aiyar for Respondent.

K.S.

Patanjali Sastri, J. Kotayya *v.* Ramakotayya and another.
2nd May, 1941. **C.R.P. No. 1659 of 1937.**

Provincial Insolvency Act (V of 1920), *S.* 28 (5)*—Agriculturist's properties—Exemption from vesting—Test—Material date.*

The question for determination in claims for exemption under S. 28 (5) of the Provincial Insolvency Act is whether the insolvent was an "agriculturist" at the time of the adjudication when the vesting is to take place and not the time of the enquiry into the application.

P. Satyanarayana Rao for Petitioner.

V. Rangachari for Respondent.

K.S.

Burn, J. Venkatarama Iyer *v.* Samayan.
25th April, 1941. **C.R.P. No. 1215 of 1940.**

Practice—Vakalat—New receiver—Necessity to bring himself on record and file fresh vakalat.

It is obligatory upon a new receiver to get himself brought on record in place of the former receiver (28 Mad. 15). This cannot be done by substituting his name in the vakalat executed by his predecessor. The engagement made by the former receiver must be treated as having come to an end with his discharge and the new receiver must engage his vakil afresh.

J. Subbuswami for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S.

Horwill, J. Rabiyath *v.* Mayankutty.
1*st May,* 1941. **C.R.P. No. 352 of 1939.**

Limitation—Acknowledgment of liability—What amounts to.

A statement by the defendant in a letter to the plaintiff (the deceased's legal representative) saying that "a sum of Rs. 964-4-10 was lying as balance to his (deceased's) credit in our accounts at the time of his death" is not a present acknowledgment of an outstanding debt.

Case-law discussed.

B. Pocker for Petitioner.

K. P. Ramakrishna Aiyar for Respondents.

K.S.

Wadsworth, J. Chinnammal *v.* Sundara Rao.
2*nd May,* 1941. **C.R.P. No. 2472 of 1939.**

Civil Procedure Code (V of 1908), *O.* 34, *r.* 1*—Scope.*

When in a suit by an assignee of a mortgage from the trustee under the mortgagee's will, the mortgagor sets up the title of the mortgagee's heir and the latter repudiates the will and claims to be impleaded, the Court is bound under O. 34, r. 1, C. P. Code, to implead the heir and decide who is entitled to the mortgage debt and who can give a valid discharge to the mortgagor.

T. S. Vaidyanatha Aiyar for Petitioner.

U. S. Ramaswami Aiyar for Respondent.

K.S.

Horwill, J. Syed Muhammad *v.* The Donation Union Link of Railways.
2*nd May,* 1941. **C.R.P. No. 1270 of 1939.**

Contract Act (IX of 1872), *S.* 74*—Applicability.*

One of the rules relating to a Mutual Benefit Society provided that: "A member who fails to pay his subscription by the last day of the month for which it is due shall be regarded as a defaulter. As such, he shall be allowed two months of grace for payment of arrears of subscriptions and if by the end of the second month of grace, no payment is received he shall cease to be a member of the Link and he shall forfeit all rights and claims on the society." Plaintiff having committed a breach of contract, asked for the return of the money paid in by him contending that the provision for forfeiture was a penalty within the meaning of S. 74 of the Contract Act.

Held, that S. 74 has no application to the case. S. 74 deals with cases in which a person stipulates that upon breach of contract by him, he will pay something to the innocent party of the contract. In such cases, the party aggrieved is entitled by way of damages to receive an amount not exceeding that stipulated by way of penalty. But the money paid in by the plaintiff ceased to be his as soon as he paid it to the society and he cannot recover it. To allow him to recover will be giving him compensation for the loss that has accrued to him through his breach of contract and not relief against a harsh penalty.

S. K. Ahmed Meeran for Petitioner.

C. Krishnaswami Aiyar for *Messrs. King and Partridge* Solicitors for Respondent.

K.S.

Wadsworth and Somayya, JJ.
23*rd June,* 1941.

Kandappa Goundan, Accused.
Crl. App. No. 143 of 1941.
and Crl. R. C. No. 28 of 1941
(Crl.R.P. No. 266 of 1941).

Criminal Trial—Offence of murder—Motive sexual jealousy—How far ground for awarding lesser sentence.

King-Emperor v. *Dinabandu Mitra,* (1 Cr.L.J. 62) is not an authority for the proposition that when the motive for a brutal murder is sexual jealousy the lesser sentence should ordinarily suffice. The question whether there are grounds for imposing the extreme penalty must depend on the facts of each case. It cannot be said that the mere existence of the sexual motive is automatically sufficient to render the death penalty unsuitable. The judges have upon them a duty to study the facts and arrive at the difficult and responsible decision as to the propriety of the lesser punishment.

M. Santosh for the Accused.

Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Wadsworth, J.
8*th July,* 1941.

Janab Abdul Razak Sahib, Mutavali *v.*
Narayanaswami and others.
Crl. R. C. No. 517 of 1941
and Crl. R. P. No. 487 of 1941.

Criminal Procedure Code (V of 1898), *S.* 144—*Civil Court seized of matter declining to restrain owner of property constructing building—Order under S.* 144, *Cr. P. Code by magistrate—Propriety.*

Where the Civil Court which is seized of the matter has declined to restrain the owner of property from constructing a building thereon, merely because of an apprehension regarding the future use of that building, it is improper in the absence of any real emergency for the magistracy to fall back on S. 144, Cr. P. Code and nullify the effect of the Civil Court's order.

B. Pocker for Petitioner.

Public Prosecutor (*V. L. Ethiraj*) for the Crown.

Respondents not represented.

K.S.

The Chief Justice and Chandrasekhara Aiyar, J. 16*th July*, 1941.

Siddamullana *v.* Pompanna Setty and Debt Conciliation Board, Adoni.

C.M.P. No. 7313 of 1940.

Madras Debt Conciliation Act (*XI of* 1936), *S.* 3 (4)—*Disagreement between members of the Board—Right of chairman to decide by his casting vote.*

The petitioner's debt was declared discharged under S. 10 (2) of the Debt Conciliation Act on the ground that he had not complied with the notice served upon him under S. 10 (1). The chairman of the Board held that he had been served and in consequence his debt should be declared discharged under S. 10 (2). One of the other two members of the Board considered that there was a doubt whether the petitioner had been served and he was in favour of giving him the benefit of it. The third member refused to give any decision and left the meeting. Thereupon the chairman gave his casting vote against the petitioner.

Held, in a petition to quash the proceedings, that in the circumstances it cannot be said that the chairman's decision was an arbitrary one, nor can it be said that he had acted contrary to law. The fact that there was disagreement between him and the other members of the Board who remained to decide the case, gave the chairman the right of finally deciding the matter [S. 3 (4)]. The Court cannot issue a *writ of certiorari* as there has been no arbitrary or unlawful action.

K. Srinivasa Rao for Petitioner.

A. Gopalacharlu for 1st Respondent.

The Government Pleader (*K. Kuttikrishna Menon*) on behalf of the Board.

K.S.

Horwill, J. 16*th July*, 1941.

Yelumalai Chetti, Accused.

Crl. R.C. No. 1 of 1941

Crl. R.P. No. 1 of 1941.

Madras Gaming Act (*III of* 1930), *Ss.* 3 *and* 4—*House in which betting on horse race takes place—If 'common gaming house' under S.* 3—*Paraphernalia of betting found in the house—How far evidence.*

No doubt the main part of S. 3 reads as if it did not apply to horse racing, because it refers to a "room or place in which cards, dice, tables or other instruments of gaming are kept or used", such expressions being hardly applicable to the slips drawn in connection with betting on horse racing. But the second paragraph of that section says " 'gaming' includes wagering or betting on a horse race".

Accordingly, a house in which wagering or betting on horse race takes place is a common gaming house. It cannot be said that the wording of Ss. 4 (*i*) and 4 (*ii*) makes it impossible to apply the definition of a common gaming house to a house in which such wagering or betting on horse race takes place. S. 6 enables a Court to take as evidence of a building being a common gaming house the mere fact that the paraphernalia (betting slips, etc.) of betting were found in it.

T. R. Venkatarama Sastri, F. S. Vaz, K. Seshagiri Rao Naidu and *N. Krishnamurthi* for Petitioner.

The Public Prosecutor (*V.L. Ethiraj*) for the Crown.

K.S.

N.R.C.

Horwill, J. Venkataraghava Aiyar, Accused.
16th July, 1941. **Crl. R.C. No. 161 of 1941.**
Crl. R.P. No. 154 of 1941.

Madras Local Boards Act (XIV of 1920), Ss. 193 *and* 207—*Storing and selling firewood within Panchayat Board limits—No licence necessary.*

Schedule VII of the Local Boards Act, unlike Sch. VI of the City Municipal Act, does not require that a licence should be taken out for storing firewood. Accordingly where a person failed to obtain a licence for storing and selling firewood during the year 1939-40 within the limits of a Panchayat Board, he has committed no offence in storing firewood.

Quaere.—Whether he could sell firewood without a licence and by doing so exercised a trade.

K. V. Ramachandra Aiyar for Accused.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Somayya, J. Mahamad Ebrahim *v.* Allapichai Rowther.
16th July, 1941. **S.A. No. 578 of 1938.**

Civil Procedure Code (V of 1908), S. 13—Ex parte *decision of foreign Court—When, one on merits.*

A decision of the Penang Court passed *ex parte* but on proof of the plaintiff's claim according to the procedure of that Court is a judgment on the merits within the meaning of the term as used in S. 13 of the Civil Procedure Code. 50 Mad. 261, followed.

K. V. Srinivasa Aiyar for Appellant.

C. S. Venkatachariar and *D. Ramaswamy Aiyangar* for Respondent.

K.S.

Wadsworth, J. Raja V. Maheswara Rao
16th July, 1941. *v.* Narasimha Rao.
C.R.P. No. 475 of 1941.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 3 (*i*)—*Re-united Hindu family—If undivided Hindu family for purposes of S.* 3 (i) *of Act IV of* 1938.

A reunited Hindu family is for the purpose of S. 3 of Madras Act IV of 1938 an undivided Hindu family.

The Advocate-General (*Sir A. Krishnaswami Aiyar*), *B. C. Seshachala Aiyar* and *C. Krishna Reddy* for Petitioner.

Ch. Raghava Rao for Respondent.

K.S.

Venkataramana Rao, J. M.H.H. Madrasa School *v.*
16th July, 1941. Municipal Council, Tiruvarur.
S.A. No. 1125 of 1940.

Madras District Municipalities Act (V of 1920), *S.* 267-*A—Owner of private market in a municipality—Whether entitled to prevent the municipality from opening a new market.*

All that S. 267-A of the Madras District Municipalities Act says is that it is open to a Municipal Council to acquire the rights of any person to hold a private market. That does not confer any right on the owner of a private market to compel the municipality to acquire his right and not open a new market. The English common law rule that the owner of a private market can prevent another market being opened within a radius of 6 2/3 miles, is an artificial rule and is not countenanced even in England as

being a sound one. It is not a rule which is based on any equity or principles of good conscience which the Courts are compelled to adopt in India. There is no such thing as a market franchise or a right to hold a market conferred by grant from the Crown in India.

47 Cal. 1079, relied on.

K. Rajah Aiyar and *K. S. Desikan* for Appellant.

S. Muthiah Mudaliar for Respondent.

K.S.

Somayya, J. Avana Mana *v.* Maria Kutti Umma.
17th July, 1941. **S.A. No. 586 of 1938.**

Transfer of Property Act (IV of 1882), S. 59—Rule as to attestation of mortgage—If applicable to registered hypothecation bond of a fund in Court.

On a question whether a registered bond hypothecating a fund in Court executed by the first defendant, but not properly attested, operated as a valid hypothecation,

Held, that the provision regarding attestation in S. 59 of the Transfer of Property Act was not applicable to a case of hypothecation of movables and therefore the bond operated as a valid hypothecation of the fund in Court.

N. R. Sesha Aiyar for Appellant.

B. Pocker for Respondent reporting no instruction.

K.S.

The Chief Justice and Venugopala Mudaliar *v.*
Chandrasekhara Aiyar, J. Ekambara Naidu.
18th July, 1941. **O.S.A. No. 4 of 1941.**

Madras High Court Original Side Rules, O. XLV, r. 7, cl. (d)—Scope and applicability.

Before an order under cl. (*d*) of r. 1 of O. 45, Original Side Rules, to pay into Court moneys in the hands of executors, etc., it must be admitted by the executors, administrators or trustees that they have money actually in their hands. Clause (*d*) of r. 1 of O. 45 does not refer to moneys which ought to be in their hands but only says that an originating summons may be taken out under its provisions for an order directing payment into Court of moneys *in the hands* of executors, administrators or trustees.

N. Panchanatha Aiyar for Appellant.

V. Sundararajan for Respondent.

K.S.

Chandrasekhara Aiyar J. Venkatasubbiah *v.*
18th July, 1941. Venkatasubbiah
C.R.P. No. 1185 of 1939.

Practice—Suit of small cause nature numbered and tried as an original suit as the presiding District Munsif had no small cause jurisdiction—Appealability of decree in such suit.

A suit in a District Munsif's Court was filed originally on the small cause side as it ought to have been but was later tried as an original suit as the District Munsif who happened to try it had no small cause powers and could not try it except as an original suit. In a revision petition, on the question whether an appeal could lie from such a decree,

Held, that such decree was appealable. 69 M.L.J. 443, distinguished.

N. Vasudeva Rao for Petitioner.

Kasturi Seshagiri Rao for Respondent.

K.S.

Venkataramana Rao, J.
21*st July,* 1941.

Ramanathan Chettiar *v.* Sri Ramaswami Bank, Ltd.
A.A.A.O. No. 3 of 1940.

Civil Procedure Code (V of 1908); O. 21, r. 90, *Proviso*—Intra vires.

Proviso 2 to O. 21, r. 90, Civil Procedure Code (Madras), is not *ultra vires* the rule-making powers of the High Court.

K. S. Ramabhadra Aiyar for Appellant.

B. V. Viswanatha Aiyar for Respondent.

K.S.

Gentle, J.
25*th July,* 1941.

Chinoy *v.* Chinoy.
Application No. 1360 of 1941 in O.M.S. No. 3 of 1941.

Parsi Marriage and Divorce Act (III of 1936), *S.* 47-*B*—*Leave to sue obtained on the Original Side of the Madras High Court—Revocation of leave, how to be sought—Remedy is by way of appeal only as provided by S.* 47-*B of the Act and not by application under the Original Side Rules—Rules inconsistent with the Parsi Marriage and Divorce Act, not applicable to cases under the Act.*

Where leave to sue on the Original Side of the High Court has been obtained in a Parsi Matrimonial Suit, the remedy of the party insisting to have such leave set aside is by way of appeal as provided in S. 47-B of Act III of 1936 and not by way of an application to revoke the leave granted, under the Original Side rules.

Though under the earlier Parsi Marriage and Divorce Act, XV of 1865 there was a provision enabling the High Court to frame rules of procedure for cases coming under the Act there is no such provision in the present Act III of 1936 and the provisions of the latter Act alone would apply and the rules of the Original Side cannot be availed of if inconsistent with the provisions of that Act.

S. V. B. Row for Applicant (Defendant).

C. R. Pattabhiraman and *C. V. Nilakantan* for Respondent (Plaintiff).

K.S.

Venkataramana Rao, J.
25*th July,* 1941.

Muniappa Mudaliar *v.* Kuppuswami Mudaliar.
S.A. No. 784 of 1940.

Hindu Law—Maintenance—Adult illegitimate son—If entitled to claim maintenance from putative father personally.

Under the Hindu Law a putative father who does not possess any joint family or ancestral properties is under no personal obligation to maintain his adult illegitimate son. An illegitimate son cannot claim any higher rights regarding maintenance than a legitimate son.

M. Chelva Aiyangar for Appellant.

M. Natesa Aiyar for *V. Ramaswami Aiyar* for Respondent.

K.S.

Wadsworth, J.
16th July, 1941.

Krishna Menon *v.* Kunjandi.
C.R.P. No. 1448 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 15—Scope—Mortgage by jenmi with possession and a lease, back of the property to jenmi—Rent payable by, is not "interest"—Mortgagee whether "intermediary"—Right of mortgagor-lessee to relief in respect of arrears of rent.

In the case of a mortgage with possession and a contemporaneous lease back the "rent" payable is not "interest" so far as Act IV of 1938 is concerned. The lease although contemporaneous with and closely related to the mortgage must be regarded as a lease and the payment thereunder must be regarded as rent. (1940) 2 M.L.J. 760.

Such a mortgagee leasing back the properties has an interest entitling him to possession of the land which he has transferred to another, namely, the jenmi himself. The mortgagee is therefore an "intermediary" as defined by the Malabar Tenancy Act. The "rent" payable to the mortgagee therefore falls within S. 15 of Madras Act IV of 1938 and the mortgagor jenmi is entitled to relief under that section if he has made the required deposit within the time laid down in the Act.

P. Govinda Menon for Petitioner.

A. K. Pavitran for Respondent.

K.S.

Venkataramana Rao, J.
16th July, 1941.

Pethaperumal Chettiar *v.* Veluchami Pillai and another.
S.A. No. 879 of 1939.

Madras Estates Land Act (I of 1908), S. 77—Right to recover rent—Failure to exercise—If confers on the ryot the right to melwaram.

Once when it is declared in a suit that the defendants were the ryots in possession of the *kudiwaram* interest and not entitled to the *melwaram* interest, the mere non-collection of rent by the landlord would not confer adverse title on the ryots. Accordingly where a suit is brought within twelve years, from the date on which the legal relationship was declared by the prior judgment, for the recovery of rent for three years prior to the suit, no question of adverse possession arises as to the *melwaram.*

P. S. Sarangapani Aiyangar for Appellant.

R. Narasimhachari for Respondents.

K.S.

Burn and Happell, JJ.
17th July, 1941.

Gangi Reddi *v.* Narasimha Reddi.
C.M.A. No. 179 of 1939.

Provincial Insolvency Act (V of 1920), Ss. 4, 9, 24 and 25—Scope—Petitioning creditor's debt and right to apply for adjudication of debtor as insolvent questioned—Insolvency Court bound to decide the question.

In a creditor's petition for adjudication of the debtor as an insolvent, the debtor disputed the debt of the petitioning creditor and his right to present the petition and the District Court dismissed the petition holding that complicated questions of law and fact arose and in the alleged exercise of its discretion referred the petitioning creditor to a regular suit to establish his debt. On appeal,

Held, that (1) S. 4 of the Provincial Insolvency Act comes into play only after an order of adjudication is passed.

(2) There is no discretion conferred on an Insolvency Court by any of the provisions of the Act to refer a petitioning creditor to a regular suit to establish his right to apply for an order of adjudication.

(3) It is the bounden duty of the Insolvency Court to decide on the right of the petitioning creditor to apply for adjudication, however complicated the question may be.

N R C

59 Bom. 161, dissented from.

Kasturi Seshagiri Rao for Appellant.

V. Govindarajachari and *P. Ramalinga Reddi* for Respondents.

K.S.

Somayya, J. Ittichiri *v.* Appu Menon and others.
18th July, 1941. **S.A. No. 309 of 1938.**

Malabar Tenancy Act (XIV of 1930), *S.* 17—*Right of kanomdar to call upon his immediate landlord for renewal—Property belonging to public temple—Madras Hindu Religious Endowments Act (II of* 1927), *S.* 76—*Necessity for sanction of lease or mortgage for over* 5 *years—Effect on right of renewal under Malabar Tenancy Act, S.* 17.

Where the kanomdar is entitled to call on his immediate landlord for renewal of his kanom for 12 years, the fact that the properties belong to a public temple cannot affect the right of renewal. The bar enacted in S. 76 of Madras Act II of 1927 cannot apply to the case of a compulsory renewal under S. 19 and Ss. 22 to 25 of the Malabar Tenancy Act.

D. A. Krishna Variar and *Ravi Varma* for Appellant.

P. Govinda Menon and *D. H. Nambudripad* for Respondent.

K.S.

Wadsworth, J. Natesa Naicker *v.* Sambanda Chettiar.
21st July, 1941. **A.A.O. No. 436 of 1940 and C.R.P. No. 491 of 1941.**

Civil Procedure Code (V of 1908), *O.* 47, *r.* 1—*Decision overlooking leading authority—How far ground for review.*

The decision in 46 Mad. 955 is not an authority for the view that whenever a Judge has overlooked a ruling he has power to review his decision; nor is it authority for the view that whenever after a judgment has been pronounced a subsequent ruling changes the accepted view of the law, that subsequent ruling can be a ground for review. Where however the legal position is clearly established by a well-known authority and by some unfortunate oversight the Judge has gone wrong by the omission of those concerned to draw his attention to the authority, it may in a proper case be a ground for review coming within the category of an error apparent on the face of the record.

R. Thirumalai Thathachariar and *R. V. V. Thathachariar* for Appellant.

A. K. Muthuswami Aiyar for Respondent.

K.S.

Wadsworth, J. Krishnamurti *v.* Imperial Bank of India at Rajahmundry.
21st July, 1941. **C.R.P. No. 1145 of 1941.**

Madras Agriculturists' Relief Act (IV of 1938), *S.* 4 (e)—*Debt due to Imperial Bank—Suit on—Agreement by bank to transfer* in futuro *the fruits of the decree to a third person—Debt whether exempted under S.* 4 (e) *of Act IV of* 1938.

Where there is no transfer *in praesenti* of a debt or decree in its favour by the Imperial Bank to a third person but a mere agreement to transfer *in futuro* the fruits of the decree, that debt is one falling within S. 4 (*e*) of Act IV of 1938 and cannot be scaled down.

P. Somasundaram for Petitioner.

O. T. G. Nambiar instructed by *King and Partridge* and *P. V. Vallabhacharyulu* for Respondents.

K.S.

Abdur Rahman, J. Krishnamachariar *v.* Lakshmi Ammal.
23rd July, 1941. **S.A. No. 903 of 1938.**

Madras Land Encroachment Act (III of 1905), S. 6—Assignment of site by Government after cancellation of previous lease to another—Right of assignee to sue previous lessee for possession in Civil Court—Effect of S. 6 *of Act, III of* 1905.

The defendant was granted a site by the Government on patta on certain conditions. When the defendant failed to comply with those conditions the Revenue Divisional Officer cancelled the assignment and the Tahsildar assigned the site to the plaintiff who then sued the defendant for possession thereof. It was contended by the defendant that the suit was not competent and that it was incumbent on the Government to proceed under S. 6 of Land Encroachment Act, which would give him a right of appeal to the revenue authorities and failing that a right to bring a suit within six months.

Held, S. 6 of the Land Encroachment Act, gives a summary remedy to the Collector but does not take away the right of the Government to proceed in a Civil Court or the right of an assignee from Government to proceed against the previous lessee in a Civil Court. 38 Mad. 674 distinguished. The defendant can have no grievance if he, instead of being compelled to sue in a Civil Court is forced to come to the Civil Court as the defendant in a suit instituted either by the Government or by the Government's assignee.

M. Krishna Bharathi and *S. Annamalai* for Appellant.

S. Ramanujachariar for Respondent.

K.S.

Horwill, J. Sehu Muhammad Maraikayar—Accused.
24th July, 1941. **Crl. R. C. No. 259 of 1941.**
Crl. R. P. No. 245 of 1941.

Madras Local Boards Act (XIV of 1920), *S.* 229—*Uttering offensive abuse against third person on the occasion of a demand for tax being presented to accused by a bill collector—Whether offence under S.* 229 *of Local Boards Act—"Molest"—Meaning.*

The petitioner uttered abusive language against some unnamed persons on the occasion of a demand for tax being presented to him by the complainant, a bill collector of a panchayat board. It was contended by the prosecution that the uttering of offensive abuse amounted to 'molesting' and an offence under S. 229 of the Local Boards Act.

Held, that S. 229 does not make punishable molestation *during* the course of the performance of the duty but only one *in* the performance of the duty, which suggests that the abuse should not merely take place while the person is engaged in his duty, but it must in some way interfere with his work. Where the person abused was not the bill collector but some unnamed person, inimically disposed towards the petitioner, who had given information leading to an exaggerated assessment though a conviction under S. 504, I.P. Code, would have been proper the conviction under S. 229 of the Local Boards Act cannot stand and must be set aside.

S. Ramachandra Aiyar for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Horwill, J. Sudalaimada Kudumban—Accused.
30th July, 1941. **Crl. R. C. No. 367 of 1941.**
Case Referred No. 18 of 1941.

Criminal Procedure Code (V of 1898), *S.* 349 (1) *and* (2)—*Scope.*

A stationary Sub-Magistrate found the accused guilty of an offence under S. 324, I. P. Code, but as he thought that an order under S. 106, Cr.

P. Code, had to be passed against the accused and he had no power to do so himself, he acted under S. 349 (1), Cr. P. Code and submitted the proceedings and forwarded the accused to the Sub-Divisional Magistrate to whom he was immediately subordinate. The joint Magistrate instead of acting under S. 349 (2), Cr. P. Code, considered the proposal of the Sub-Magistrate that proceedings should be taken under S. 106, Cr. P. Code, and came to the conclusion that it was not necessary. He thereupon sent the case back to the Sub-Magistrate for disposal.

Held, that the joint Magistrate was bound to dispose of the case himself, although he was not, of course, obliged to pass an order of the nature considered necessary by the stationary Sub-Magistrate.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

Accused not represented.

K.S.

Horwill, J. Rex. *v.* Jayagopal and others.
30*th July,* 1941. **Cr.R.C. No. 373 of 1941 (Cr.R.P. No. 354 of 1941).**

Madras City Police Act (*III of* 1888); *S.* 47—*Money found in the pockets of persons found to be guilty of betting on horse races in a gaming house—When liable to forfeiture—Principles.*

Under S. 47 of the City Police Act, the Magistrate may order all or any of the articles seized in a gaming house or the proceeds thereof to be forfeited. Money found in the pockets of the persons found guilty of betting on horse races in a premises had also been seized by the police. On the question whether this money ought to be forfeited,

Held, that the general principles to be adopted by a Magistrate in considering a question of this kind is whether the money is likely to have been used in connection with the gaming. If it is likely to have been so used the Magistrate should order forfeiture otherwise not.

Crown Prosecutor (*P. Govinda Menon*) for the Crown.

A. S. Veeraraghavan for Respondents.

K.S.

The Chief Justice and Narikkal Chathan *v.*
Chandrasekhara Aiyar, J. Kesavan Nambudri.
31*st July,* 1941. **S.A. No. 580 of 1938.**

Malabar Tenancy Act (*XVI of* 1930), *S.* 20, *sub-S.* (5)—*Eviction—Grounds—Landlord requiring holding* bona fide *for his own cultivation—Meaning of "requires"—Element of need or necessity not essential.*

When a landlord demanded or asked for or sued for any land on the ground that he wished to cultivate it himself his statement must be made *bona fide*; there need be no element of need or necessity and the word "requires" in sub-S. (5) of S. 20 of the Malabar Tenancy Act does not mean "in actual positive need".

View expressed in S. A. No. 538 of 1939, (1941) 1 M.L.J. (N.R.C.) p. 77, approved and that in S.A. No. 42 of 1939, not followed. 26 C.W.N. 499, distinguished.

P. Govinda Menon for Appellant.

D. H. Nambudripad for Respondent.

K.S.

Burn and Happell, JJ.
16th July, 1941.

Subbayya and others *v.* Official Receiver, Cuddappah.
C.M.A. No. 368 of 1939.

Provincial Insolvency Act (V of 1920), *S.* 50—*Expunging debts from the schedule of creditors—Burden and standard of proof.*

The Official Receiver moved for expunging certain debts from the schedule of creditors framed by him and relied on certain suspicious circumstances, as disclosed in the evidence of those creditors.

Held, (1) that the burden was on the receiver who wanted to have the names expunged and not on the creditors; (2) that the creditors could only adduce evidence regarding the due execution of the promissory notes and the passing of consideration thereunder and if inspite of that the suspicion remained they could not be expected to do more. The Court's decision ought to be based on the positive evidence in the case and not on suspicious circumstances.

Kasturi Seshagiri Rao for Appellants.

Respondent, unrepresented.

K.S.

Horwill, J.
22nd July, 1941.

The Public Prosecutor *v.* Satyanarayana.
Cr. App. No. 178 of 1941.

Criminal Procedure—Acquittal after consideration of evidence—When to be set aside.

Ordinarily an accused who is acquitted can argue that the Magistrate after giving the evidence his careful consideration had come to the conclusion that the prosecution had not proved beyond all reasonable doubt that he was guilty of the offence with which he was charged. But where the judgment of the Magistrate is clearly unjudicial (no fair and unprejudiced discussion of the evidence being found anywhere in it and there are points in the prosecution case that need careful consideration and cannot lightly be brushed aside), the order of acquittal must be set aside and the appeal remanded for fresh disposal.

The Public Prosecutor (*V. L. Ethiraj*) for Appellant.

P. V. Rajamannar, K. Subba Rao and *N. Seshachalam* for Accused.

K.S.

Wadsworth, J.
23rd July, 1941.

Kondama Naidu *v.* Subba Reddi.
S.A. No. 782 of 1938.

Madras Estates Land Act (Amending Act of 1936), *S.* 6—*Scope—Occupancy rights—When available.*

There is nothing to prevent a whole inamdar in whom both the warams are vested from creating an occupancy right in favour of one of his tenants either by sale or by grant. There can thus be an occupancy right in favour of a cultivating tenant in an *inam* village which is not an estate under the Madras Estates Land Act. Hence a person claiming occupancy rights need not prove that the village was an estate under the Estates Land Act prior to its amendment or that he was in possession so as to claim occupancy rights under the amended Act.

A. Lakshmayya for Appellant.

A. C. Sampath Aiyangar, T. K. Subramania Pillai and *S. Krishnamachariar* for **Respondent.**

K.S.

N R C

Abdur Rahman, J.
24th July, 1941.

Thangavelu Aiyar *v.* Ramabhadra Goundan.
S.A. No. 957 of 1938.

Transfer of Property Act (IV of 1882), *Ss.* 54 *and* 55 (4)—*Assignment of mortgage debt—If 'sale'—Vendor's lien—Availability.*

The assignment of a mortgage debt falls within the definition of 'sale' and thus attracts the provisions of S. 55 (4) in regard to vendor's lien.

41 M.L.J. 267 and 41 M.L.J. 297, relied on. (1939) 1 M.L.J. 544 (P.C.), referred to.

R. Rangachari for Appellant.

V. T. Rangaswami Aiyangar for Respondent.

K.S.

Burn, J.
24th July, 1941.

Venkiah Chetti *v.* Municipal Council, Karur.
S.A. No. 773 of 1938.

Madras District Municipalities Act (V of 1920), *S.* 78 (3), *Proviso* 1—*Period of 'not less than one month' for submission of objections to proposed levy or increase of tax—Computation—Whether to be from date of publication in the Gazette.*

The period provided in S. 78 (3) proviso of 'not less than one month' for the submission of objections need not be computed from the date of publication of notice in the District Gazette under that section of levy or increase of tax.

A Bhujanga Rao and *D. R. Krishna Rao* for Appellant.

T. K. Sundararaman for Respondent.

K.S.

Horwill, J.
30th July, 1941.

Narayanaswami *v.* Narayya.
Crl.R.C. No. 346 of 1941.
(Crl.R.P. No. 329 of 1941).

Criminal Procedure Code (V of 1898), *S.* 247—*Order by Bench Court improperly constituted—Power to review or rectify lies in High Court and Bench Court itself has no power.*

Three Bench Magistrates sat to consider a case. At a later hearing of the case a fourth Magistrate joined. At the final hearing one of the first three was not present. Of the remaining three only two Magistrates had sat throughout. The case was dismissed under S. 247, Criminal Procedure Code, as the complainant was absent on the date of the final disposal. Later the Magistrates realised that they had passed an illegal order and so proceeded to rectify it by hearing the case once again. On revision,

Held, a Bench Court has no power to correct errors in its judgments or to review its own illegal orders. Such power vests only in the High Court. The illegal order acquitting the accused stands until set aside. As the complainant was absent at the final hearing the result of the case would not have been different even if the Bench Court had been properly constituted. The interests of justice did not require that the accused should stand their trial afresh.

G. Balaparameswari Rao for Petitioner.

T. Venkatadri for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

King, J.
30th July, 1941.

Amirthalinga Desikar
v. Thangammal.
S.A. No. 867 of 1938.

Husband and wife—Decree for separate maintenance in favour of wife—Effect on husband's right to sue for restitution of conjugal rights.

Where in a prior suit the Court had granted separate maintenance to the wife the husband is for ever afterwards debarred from suing for restitution of conjugal rights.

V. T. Rangaswami Aiyangar for Appellant.

M. S. Venkatarama Aiyar for Respondent.

K.S.

Lakshmana Rao, J.
31st July, 1941.

Basamma *v.* Nagi Reddi.
C.R.P. No. 1749 of 1938.

Civil Procedure Code (V of 1908), *O.* 33, *r.* 1—*Scope.*

In an application for leave to sue in *forma pauperis* for recovery of certain immovable property the defendants contended that the plaintiff was in possession of the properties for the recovery of which she filed the suit and therefore was not entitled to sue in *forma pauperis.*

Held, that the subject-matter of the suit should be excluded from consideration and the plaintiff must be allowed to sue as pauper.

Kasturi Seshagiri Rao for Petitioner.

K. Srinivasa Rao for Respondent.

K.S.

Horwill, J.
31st July, 1941.

Inayathulla *alias* Rahmathulla—Accused.
Crl. Appeal No. 321 of 1941.

Criminal Procedure Code (V of 1898), *S.* 109—*Binding over a person for good behaviour—When to be ordered.*

Where an accused follows no honest employment, lives in the company of notorious criminals and has no ostensible means of livelihood, a Magistrate is warranted in binding over the accused under S. 109, Criminal Procedure Code and calling on the accused to execute a bond for Rs. 100 with two sureties for a like amount to be of good behaviour for a period of one year. Where such accused is unable to furnish the security he can be committed to jail.

Accused not represented.

Crown Prosecutor (*P. Govinda Menon*) for the Crown.

K.S.

Horwill, J.
1st August, 1941.

The Inspecting Assistant Commissioner of Income-tax *v.* Javerbhai and others.
Crl.R.C. No. 806 of 1940.
(Crl.R.P. No. 760 of 1940).

Income-tax Act (XI of 1922), *S.* 52—*Agent if can present a return—Liability of such agent for making a false return.*

There is no reason why an agent cannot present a return for the assessee his principal. The word 'person' in S. 52 can be given its dictionary meaning and can include the assessee's agent making a return. Accordingly an agent making a fraudulent return on behalf of his principal is liable to be proceeded against for an offence under S. 52 of the Income-tax Act.

V. L. Ethiraj for *A. S. Sivakaminathan* for Petitioner.

K. S. Jayarama Ayyar, V. V. Srinivasa Aiyangar, T. R. Venkatarama Sastri, P. S. Sarangapani, N. D. Varadachari and *R. Viswanathan* for Respondents.

Crown Prosecutor (*P. Govinda Menon*) for the Crown.

K.S.

Somayya, J. Lakshmi Reddi *v.* Lakshmayya.
4th *August,* 1941. **S.A. Nos. 1055 to 1059 of 1938.**

Evidence Act (I of 1872), S. 21—Admission by party in his deposition in previous criminal proceedings—Effect.

The lower appellate Court decided that an adoption set up by the plaintiff was not proved as there was no proof of giving and taking and explained away the admission by the defendant as to the adoption in a deposition given in earlier criminal proceedings.

Held, on second appeal, (1) that what a party himself admits to be true may reasonably be presumed to be true until the presumption is rebutted; (2) that such an admission can only be explained away by the party who made it and not by the Court; and (3) that no further proof of adoption was necessary in view of the admission contained in the earlier deposition of the defendant in the criminal proceedings. I.L.R. 29 All. 184 (P.C.), relied on.

Kasturi Seshagiri Rao for Appellant.

B. Jagannatha Das for Respondent.

K.S.

Chandrasekhara Aiyar, J. Gundu Rao *v.* Subbiah Chetty.
8th August, 1941. **S.A. No. 139 of 1939.**

Civil Procedure Code (V of 1908), S. 100—Evidence that suit mortgage was supported by consideration—Finding on probabilities of the case that mortgage was not supported by consideration—Not open to attack in second appeal.

Even where the evidence in the case is all one way that the suit mortgage was supported by consideration it is permissible for the lower appellate Court to arrive at a finding on the probabilities of the case that the document was not supported by consideration. Such a finding of fact cannot be attacked in second appeal.

Where the document is found to be nominal and sham even though the executants admit the passing of consideration no decree for money can be passed against the executants.

V. S. Narasimhachari for Appellant.

Kasturi Seshagiri Rao for Respondent.

K.S.

Patanjali Sastri, J. Sepulchre Bros. *v.* Mehta.
8th August, 1941. **C.R.P. No. 2271 of 1939.**

Civil Procedure Code (V of 1908), S. 20, Cl. (c)—Place where letter of acceptance of offer is received—Whether part of the cause of action arose there.

The place where the letter of acceptance is received is also a place where part of the cause of action has arisen.

46 M.L.J. 371 and (1940) Mad. 195 (198), distinguished.

N. Rajagopala Aiyangar for Petitioner.

Kasturi Seshagiri Rao for Respondent.

K.S.

Burn and Happell, JJ. Saradambal *v.* Ramiah Reddi,
22nd July, 1941. **A.A.O. No. 256 of 1940.**

Guardians and Wards Act (VIII of 1890), *S.* 25—*Guardian asking for return of wards to his custody—Necessity of proof that such return will be for welfare of wards.*

Where a father applied under S. 25 of the Guardians and Wards Act for the return to his custody of his minor children from their mother who was living away from him, the overriding consideration will be the welfare of the wards. The guardian whose ward has left him or has been removed from his custody has to discharge the burden of showing that it will be for the welfare of the ward to return to the custody of such guardian.

T. C. K. Kurup and *D. A. Shanmugasundaraswami* for Appellant.

S. S. Ramachandra Aiyar for Respondent.

K.S.

Burn and Happell, JJ. Fatima Bibi *v.* Pevtu Saheb.
23rd July, 1941. **A.A.O. No. 348 of 1939.**

Guardians and Wards Act (VIII of 1890), *Ss.* 19 *and* 25—*Scope—Mahomedan minor girl—Custody—Father and maternal grandmother—Rights.*

On an application under the Guardians and Wards Act by a Mahomedan maternal grandmother for custody of her deceased daughter's minor daughters,

Held, that where the father is not shown to be unfit to be guardian S. 19 will be a bar to such application. Though under Mahomedan law failing the mother, the custody of a Mahomedan girl who has not attained puberty belongs by right to the mother's mother in preference to the father, yet the father of a Mahomedan girl is her legal guardian. Unless the minors had ever been in the custody of the grandmother and had left or been removed from such custody S. 25 can have no application and no question as to whether it will be for the welfare of the minors to be under the custody of the grandmother can arise.

V. Suryanarayana for Appellant.

V. Rangachari for Respondent.

K.S.

Abdur Rahman, J. Ayyavu Thevar *v.* Secretary of State.
23rd July, 1941. **S.A. No. 655 of 1938.**

Evidence—Otherwise inadmissible evidence admitted by consent of parties—When good evidence.

Unless a party can be found to have been estopped from objecting to the admissibility of certain evidence, evidence otherwise not admissible or which would have been liable to rejection if objection were taken to it, cannot be good evidence merely because it is admitted by consent of parties.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

The Government Pleader (K. Kuttikrishna Menon) for Respondent.

K.S.

Wadsworth, J. Kundanmall Sowcar *v.* Muni Ammal.
25th July, 1941. **S.A. No. 741 of 1938.**

Lease—Covenant for option of renewal—Failure to exercise within time fixed—Effect.

When a lease contains a covenant for renewal stipulating that notice of intention to renew should be given before the expiry of the lease the right of renewal is lost if the option is not exercised within the time specified, though the Court may in special circumstances relieve against the loss of the right. The lessee however is not entitled to set up the right to renewal as a defence to a suit for possession on the termination of the lease when the right to exercise the option for renewal is lost.

C. V. Nilakantan for Appellant.

T. E. Ramabhadrachariar for Respondent.

K.S.

King, J.
30th July, 1941.

Potanna *v.* Venkataramana Rao.
S.A. No. 858 of 1938.

Madras Hindu Religious Endowments Act, (II of 1927), *S.* 44-A *Sub-section* 6—*Scope.*

Where pending a suit by a reversioner to the estate of the last male-holder for possession of certain service inam lands, the Government enfranchised the inam lands and issued patta to the defendant,

Held, that the suit whether as regards the right to enjoy the land or the right to the land revenue can still be brought, in spite of the grant of patta by the Government. The Civil Courts have power to decide who is rightfully entitled to the ownership of the land which for other purposes the Government has enfranchised to a party.

T. Satyanarayana for Appellant.

G. Chandrasekhara Sastri for Respondent.

K.S,

Burn and Happell, JJ.
30th July, 1941.

Muthukaruppan Chettiar *v.* Official Receiver, West Tanjore & another.
A. A. O. No. 541 of 1939.

Provincial Insolvency Act (*V of* 1920), *Ss.* 4 *and* 53—*Scope.*

Although S. 53 of the Provincial Insolvency Act deals only with transfers from an insolvent and not with transfers from the insolvents' transferee, under S. 4 of the Act the Insolvency Court is empowered to go into the question whether such transferee's transferee has or has not good-title to the items covered by the sale-deed in his favour.

M. S. Venkatarama Aiyar for Appellant.

A. V. Visvanatha Sastri for Respondent.

K.S.

Wadsworth, J.
30th July, 1941.

Subramania Aiyar *v.* India Equitable Assurance Company Ltd.
C. R. P. No. 1324 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 10 (2) (*iii*) *and S.* 8—*Debt due to public company carrying interest at less than* 9 *per cent. in renewal of earlier ones carrying interest at* 12 *per cent.—If explanation to S.* 8 *can apply and make it a debt which can be scaled down.*

Where a debt is due to a public company and carries interest at not more than 9 per cent. it is clearly excluded from the operation of Ss. 8 and 9 and therefore those sections cannot be called in aid to substitute for this liability an earlier liability which was renewed and which bore a higher rate

of interest and thereby exclude it from the operation of S. 10 (2) (*iii*) of Act IV of 1938.

T. L. Venkatarama Aiyar and *L. Krishnaswami Aiyar* for Petitioner.

S. Srinivasa Aiyar instructed by *King* and *Partridge* for Respondent.

K.S.

The Chief Justice and Chandrasekhara Aiyar, J.
31st July, 1941.

Suryanarayana *v.* Debt Conciliation Board, Peddapuram.
C.M.P. No. 1882 of 1941.

Madras Debt Conciliation Act (XI of 1936), *S.* 18 (1)—*Power of Board to certify that reasonable offer by debtor has been refused.*

Where a Debt Conciliation Board has not attempted to scale down a creditor's debt under Madras Act IV of 1938 but has only issued a certificate under S. 18 (1) of the Debt Conciliation Act saying that the offer which the debtor made to the petitioner was a reasonable one as based on the amount which will be due if the debt was scaled down, the Court cannot go into the question whether it was really reasonable or not; that is a matter for the Board only and the orders of the Board cannot be quashed by the issue of a *writ of certiorari.*

K. Umamaheswaram for Petitioner.

K. Rangachari for second Respondent.

K.S.

Somayya, J.
1st August, 1941.

Samuel Nadar *v.* Thangayya Nadar.
S. A. No. 1084 of 1938.

Partnership Act (IX of 1932), *S.* 42—*Partnership for conducting* 50 *months chit transaction—Stopping of auction with* 42*nd month—Dissolution of partnership—When takes place—Suit for dissolution—Limitation.*

Appellant and respondent were partners who conducted a chit transaction. Auction ceased after the 42nd call (the chit being for 50 months). More than 3 years after the last chit a suit was filed for dissolution and for accounts by the respondent. The lower appellate Court held that the suit was barred.

Held, applying S. 42 of the Indian Partnership Act, that the suit was in time under Art. 106 of the Limitation Act. The partnership was not dissolved when the auction ceased and time did not begin to run till after the completion of the business for which the partnership was started.

(1938) 1 M.L.J. 574 followed.

25 C.W.N. 847: (1930) Lah. 378: 53 M.L.J. 245 (P.C.), referred to.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

R. Rangachari for *Mr. K. Rajah Aiyar* for Respondent.

K.S.

Wadsworth, J.
1st August, 1941.

Parukutty Amma *v*, Ramakrishna Aiyar.
C.R.P. No. 1544 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 15 (4)—*Payment into Court before* 30—9—1938—*Notice to landlord only later—Effect.*

Under S. 15 (4) of Act IV of 1938, what is required is a payment into Court and not a payment to the landholder, before 30th September, 1938. If the payment into Court is made before that date it will not be an invalid deposit merely because notice went to the true landholder only after 30th September, 1938.

N. Gopala Menon and *V. Karunakara Menon* for Petitioner.

K. P. Ramakrishna Aiyar for Respondent.

K.S.

Abdur Rahman, J.
5th August, 1941.

Gangayya *v.* Lakshmi Devi.
S. A. No. 1124 of 1938.

Criminal Procedure Code (V of 1898), *Ss.* 88, *Cl.* 6 (d) *and S.* 488—*Money realised by criminal Court by sale of properties attached in execution of maintenance order—Rejection of claim by third party—Subsequent suit—Government if necessary party—Scope of suits under S.* 88, *Cl.* 6 (d).

Respondent obtained an order under S. 488 of the Code of Criminal Procedure for maintenance against her husband. She got some paddy attached in execution. The paddy was sold and the sale proceeds were lying in the Magistrate's Court. The second wife of the husband of the respondent and her own maternal uncle filed separate suits each claiming the whole of the paddy attached, after their claims had been rejected by the Criminal Court. The suits were for the recovery of the money either from the Magistrate's Court or from the respondent in the event of the money having been paid to her.

Held, that as the Government had no claim to the money realised, the suit is competent without impleading the Government. S. 88, Cl. 6 (*d*) of the Criminal Procedure Code entitles a party whose claim or petition has been disallowed in whole or in part, to institute a suit to establish the right, which he claims against the property in dispute. The mere fact that on account of the sale of the property the claimant asks for recovery of money instead of a declaration does not take the suits out of the category of suits contemplated by S. 88 Cl. 6-*D* of the Code of Criminal Procedure.

B. Jagannadha Das for Appellant.

G. Chandrasekhara Sastri for Respondent.

K.S.

Horwill, J.
6th August, 1941.

Perianna Mudali and others,
Accused.
Cr.R.C. No. 493 of 1941
(Cr.R.P. No. 464 of 1941).

Criminal Trial—Jurisdiction—Aggravating facts making offence one triable by a Magistrate with higher powers—Effect on Magistrate's jurisdiction to try only the lesser offence.

Where a Sub-Magistrate really believed that the whole body of facts revealed to him constituted an offence triable by him—(a lesser offence which he had jurisdiction to try)—and had not deliberately overlooked any aggravating facts with a view to securing for himself jurisdiction over the offence, his proceedings would be proper and the High Court will not interfere.

V. T. Rangaswami Aiyangar for Petitioners.

Public Prosecutor (V. L. Ethiraj) on behalf of the Crown.

K.S.

Horwill, J.
8th August, 1941.

Jothi Venkataswami, *In re.*
Cr.R.C. No. 508 of 1941
(Case Referred No. 29 of 1941).

Madras Suppression of Immoral Traffic Act (V of 1930), *(amended by Act VII of* 1938), *S.* 8-A (2)—*Presumption under.*

Where two girls are said to have been living by prostitution the accused's association with them involves the presumption laid down in S. 8-A (2) of the Suppression of Immoral Traffic Act that he is living on their earnings.

Public Prosecutor (V. L. Ethiraj) for the Crown.

A. Gopalacharlu for accused.

K.S.

Lakshmana Rao, J.
8th August, 1941.

Nandikotkur Mahomedan Religious Endowments Committee *v.* Mulla Nabi Sahib.
C.R.P. No. 1691 of 1939.

Suit valuation—Suit by Muzawars for recovery of possession of wakf property alienated by previous managers—Valuation for purposes of jurisdiction.

Plaintiffs some Muzawars, who were not parties to a sale deed executed by the previous managers of a wakf, sued to set aside the sale deed and to recover possession of the wakf properties comprised in the sale deed. The value of the suit for purposes of jurisdiction was stated to be Rs. 4,500 being the amount for which the sale deed was executed. The trial Court dismissed the suit and an appeal was preferred to the District Court, which held that an appeal lay only to the High Court and not to itself on the ground that the plaintiffs had to seek in such a case two reliefs, namely, (1) for a declaration that the sale deed was not binding and (2) for possession, and that the value for purposes of jurisdiction would be over Rs. 6,960. On revision,

Held, that the plaintiffs were not bound to ask for setting aside the sale deed as they were not parties to it and the only relief, namely, for possession being of the value of Rs. 3,480 an appeal lay to the District Court.

Kasturi Seshagiri Rao for Petitioner.

S. S. Bharadwaj for Respondent.

K.S.

Lakshmana Rao, J.
11th August, 1941.

Govindasamy Pillai *v.* Anjaneya Chetty
C.R.P. No. 1974 of 1940.

Civil Procedure Code (V of 1908), *S.* 51—*Scope—Arrest of judgment-debtor—When proper.*

Where in an application for execution by way of arrest of the judgment-debtor, the lower Court made an order in these terms: "From the counter of the judgment-debtor himself, it is clear that he has got means to pay the E.P. amount. The fact that his property though valuable is encumbered, is not sufficient to hold that he has not got the means to pay the amount. As the decree stands, the petitioner is entitled to recover the amount either by way of arrest or attachment of the judgment-debtor's properties.

I see no good reason to curtail his right of arrest. It is open to the judgment-debtor to sell his property and pay off the amount due. He is not justified in asking the decree-holder to do it. His objection is therefore overruled."

Held, that this order was not in sufficient compliance with law under S. 51, C. P. Code, and that the order should be set aside and the application remanded for a proper disposal.

S. Jagadisa Aiyar and *G. R. Jagadisan* for Petitioner.

T. K. Srinivasathathachariar for Respondent.

K.S.

Burn, J.
13th August, 1941.

Syed Ismail Sahib *alias* Syed Tahsildar Sahib *v.* Ethiksha Sarguru *alias* Syed Chanda Sahib.
C. R. P. No. 1804 of 1939.

Mussalman Wakf Act (XLII of 1923), *Ss.* 3 *and* 10—*Default of* muttawalli *in not filing particulars relating to* wakf *under S.* 3 *of the Act—Proper Court to try the offence.*

An application was made to the District Court under S. 10 of the Mussalman Wakf Act to punish the respondent who was alleged to be the muttawalli for his default in not having filed under S. 3 of the Act the particulars of the *wakf*. The respondent denied the *wakf* character of the properties as well as his position as *muttawalli* and also contended that the District Court had no jurisdiction to enquire into the petition.

Held, that as the proceedings under S. 10 of the Wakf Act related to an offence as defined under S. 4 of the Criminal Procedure Code and as the District Court was not mentioned in S. 10 of the Wakf Act as the Court to try the offence it was only the ordinary criminal Courts that had jurisdiction to punish a person under S. 10.

The question whether the Court had jurisdiction in the proceedings to enquire about the existence of the *wakf* when it was denied was left open.

K. Bhashyam Aiyangar for the Petitioner.

S. Panchapagesa Sastri and *G. Srinivasa Aiyangar* for Respondent.

K.S.

Somayya, J.
14th August, 1941.

Venkatachelamiah *v.* Venkatayya,
S. A. No. 1156 of 1938.

Transfer of Property Act (IV of 1882), *S.* 52—*Scope—Arbitrator appointed by Registrar of Co-operative Societies—If "Court".*

The expression "Court" in S. 52 of the Transfer of Property Act is wide enough to cover the case of an arbitrator exercising judicial functions and determining a dispute. Where during the pendency of legal proceedings regarding a mortgage in favour of a co-operative society before an arbitrator appointed by the Registrar of Co-operative Societies a person takes a mortgage of the properties he cannot enforce the same as against a purchaser under the earlier mortgage in enforcement of the award.

A.C. Sampath Aiyangar and *S. Krishnamachari* for Appellant.

Kasturi Seshagiri Rao for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
14th August, 1941.

The Nagore Durga represented by its Managing Trustees *v.* Chatram Manager, Kannu Pillai.
S.A. No. 1039 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 17—*Extended period of Limitation for recovery of rent—Availability against non-agriculturist tenants.*

The benefit of the extended period of limitation was conferred on a landholder under S. 17 of Act IV of 1938 in respect of all suits for recovery of arrears of rent against a tenant irrespective of the fact whether the tenant was or was not an agriculturist.

K. V. Ramachandra Aiyar for Appellant.

S. Ramachandra Aiyar and *R. Sundaralingam* for Respondent.

K.S.

Abdur Rahman, J.
18*th July*, 1941.

Sudarsana Rao *v.* Appadu and others.
C.M.P. No. 1486 of 1941 in
S.A. No. 287 of 1938.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 8 (1)—*"Interest" included in decree for mesne profits—Liability to be scaled down.*

Though interest is an integral part of the definition of mesne profits as given in S. 2 (2) of the Code of Civil Procedure, where there is a decree for mesne profits the Court is not precluded from dealing with the interest separately and holding that it should be deemed to be discharged under S. 8 (1) of Act IV of 1938 and therefore irrecoverable.

B. V. Subramanyam for Petitioner.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Respondents.

K.S.

Somayya, J.
31*st July,* 1941.

Narasimha Rao *v.* Venkataramana Rao.
S. A. No. 278 of 1939.

Madras Hereditary Village Offices Act (III of 1895), *Ss.* 13 *and* 21—*Scope—Suit in Civil Court for declaration that a person has been appointed in contravention of S.* 10 (2)—*Jurisdiction of Civil Court.*

Where a person claims a right of succession under the Madras Hereditary Village Offices Act and a third party has been appointed by the Revenue authorities in alleged violation of his right, his remedy is to sue under S. 13 of the Act in the Revenue Court for recovery of his office from the person alleged to have been wrongfully appointed. S. 21 of the Act bars the Civil Court from entertaining such a suit. The plaintiff by merely confining his relief as one for a declaration of the invalidity of defendant's appointment cannot be permitted to agitate the matter before a Civil Court. The granting of a mere declaratory relief is discretionary and the Civil Court will refuse to grant it when the remedy which he asks is unnecessary and where the relief which he really wants is to be sought in the Revenue Courts.

K. Kameswara Rao for Appellant.

K. Venkatarama Raju for Respondent.

K.S.

Abdur Rahman, J.
4*th August*, 1941.

Jaffar Sahib *v.* Kathiya Bi.
S.A. No. 159 of 1939.

Award—Oral award—Acceptance in writing—Want of registration—Effect on enforceability.

K, a widow, instituted a suit against her husband's brother basing her claim on a document executed by him. The document was as follows :—"In accordance with the decision of the *jamatdars* mentioned hereunder which I have accepted, I hereby agree to take the share of the properties of my deceased younger brother, and pay *K*, his wife, the sum of Rs. 525 only as *mahr* within six months from this date . . . . ." It was contended that the money claim cannot be separated from the rest as the document dealt with one indivisible transaction and being unregistered was inadmissible in evidence and therefore unenforceable.

Held, that the oral award did not require registration and the mere acceptance by the defendant in writing would not make it inadmissible or unenforceable.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Appellant.

B. C. Seshachala Aiyar for Respondent.

K.S.

NRC

Horwill, J.
5th August, 1941.

Seshamma, *In re.*
Cr.R.C. No. 306 of 1941
(Cr.R.P. No. 290 of 1941).

Local Board—Licence—"Coffee house"—What constitutes.

It is a question of fact in each case whether the circumstances under which coffee is sold will indicate that the place of sale was a coffee house or not. Where all the paraphernalia of a coffee house with considerable accommodation existed it comes under the definition of a coffee house. The distinction would seem to lie in the formality or informality under which the coffee or tea is sold.

The question, whether a person having a licence to use a house as a meals hotel was entitled to sell coffee therein without a further licence, was left open.

S. Suryaprakasam for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K. S.

Wadsworth, J,
6th August, 1941.

Shahul Hamid *v.* Thenappa Chettiar
S. A. No. 1184 of 1938.

Practice—Suit on promissory-note—Defence of absence of consideration and that note was executed under undue influence—Evidence of similar transactions entered into by defendant—Relevancy.

In a suit on a promissory note the defendant pleaded that there was no consideration and that he executed the suit promissory note under undue influence when he was a young man who under the influence of evil companions had been led into vicious ways and had taken to intoxicants. Evidence as to the extravagant life of the defendant and the way in which under the influence of the evil companions he had been made to execute other documents without proper consideration was let in.

Held, that when the defendant wants to shift the burden on to the plaintiff of proving good consideration for the note, he is entitled to let in evidence that he executed the suit document as a very young man who had got into vicious habits owing to the influence of bad companions and had thereby been led to a course of conduct which made him ready to execute documents for inadequate consideration. The evidence of previous conduct and circumstances was therefore relevant.

T. L. Venkatarama Aiyar and *M. V. Ganapathi* for Appellant.

T. M. Ramaswami Aiyar for Respondent.

K.S.

Venkataramana Rao, J.
6th August, 1941.

Sundararajulu *v.* Shanmugham and others.
S.A. No. 642 of 1938.

Hindu Law—Ancestral business—Tests.

If a business is to be considered not to be new it must be shown to be a continuation or revival of an old family business. Where a business was started by a manager which had absolutely no connection with the old business, the fact that the business started was of the same nature as the old business cannot make it an ancestral business.

R. Sundaralingam and *S. Seshadri* for Appellant.

K. S. Desikan for Respondents.

K.S.

Horwill, J.
8th August, 1941.

Palayan Accused.
Crl. R.C. No. 675 of 1941
(Crl. R.P. No. 635 of 1941)

Criminal Procedure Code (V of 1898), *S.* 350—*Scope.*

There is nothing in S. 350, Criminal Procedure Code which prohibits a Magistrate from exercising his discretion of examining all the witnesses again, merely because the accused who has recalled them has exercised his right under proviso (*a*) to S. 350. Though the accused who has recalled witnesses has a right to say that no more witnesses should be examined the Magistrate has the privilege under S. 350 (1) of the Code to examine all.

Lobo for *Pais, Alvares* and *Lobo* for Petitioner.

K. V. Ramaseshan for *Crown Prosecutor* for the Crown.

K. S.

Venkataramana Rao, J.
8th August, 1941.

Petha Gounder *v.* Sami Gounder.
S. A. No. 845 of 1938.

Evidence Act (I of 1872), *S.* 73—*Disputed signature—Duty of Court to compare with admitted signature.*

In a suit on a promissory note, the genuineness of the endorsement relied on to save limitation, was disputed. Though a number of documents containing admitted signatures were filed for purposes of comparison, the lower appellate Court decreed the suit holding the endorsement to be genuine, on the evidence in the case, but after declining to compare the disputed signature with the undisputed signatures in the other documents.

Held, that the proper procedure was to act under S. 73 of the Indian Evidence Act and the Court cannot decline to compare the signatures.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

S. Panchapagesa Sastri and *G. Natarajan* for Respondent.

K. S.

Abdur Rahman, J.
13th August, 1941.

Kayambu Pillai *v.* Court of Wards and others
C. M. P. No. 4426 of 1940.

Limitation Act (IX of 1872), *S.* 5—*Application for excusing delay—What is "sufficient cause"—Analogy of S.* 14.

In applying S. 5 to cases where delay has been caused by prosecuting in good faith and with due diligence other proceeding or proceedings for substantially the same reliefs in another Court which was for defect of jurisdiction or for other causes of a like nature unable to entertain the same the analogy of S. 14 is an argument of considerable weight though S. 14 as such has no application to the case.

Though the excusing of the delay will affect the valuable right that has accrued to the respondent the question has to be approached from the point of view of the petitioner's conduct rather than with reference to the advantage gained by the respondent.

S. Sundaresa Aiyar for Petitioner.

K. Kuttikrishna Menon for Respondent.

K.S.

Horwill, J.
14th August, 1941.

Public Prosecutor, Madras *v.* Lury & Co.
Crl.App. No. 149 of 1941.

Companies Act (*VII of* 1913), *S.* 32 (5)—*Default without wilful neglect—If punishable.*

Under S. 32 (5) of the Companies Act, mere default, in not filing before the Registrar of Joint Stock Companies a list of members of the company on the date of the first annual general body meeting, is punishable even if there is no "wilful neglect" on the part of the directors. Where the company and not its representatives in their personal capacity that is sought to be convicted "wilful default" need not be proved.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

D. Narasaraju for Respondents.

K.S.

Horwill, J.
18th August, 1941.

Karuppannan—Accused.
Crl. R. C. No. 477 of 1941
(Case Referred No. 25 of 1941).

Penal Code (*XLV of* 1860), *S.* 67—*Imprisonment in default of payment of fine—Limits.*

The accused was convicted under S. 6 of the Fisheries Act and sentenced to pay a fine of Rs. 30. The fine was not paid and so the Magistrate sentenced him to three months' simple imprisonment in default. The District Magistrate being of opinion that it was not within the power of the Sub-Magistrate to sentence the accused to such a severe term referred the matter to the High Court and the explanation of the Sub-Magistrate was called for. The Sub-Magistrate's opinion was that the scale mentioned in S. 67 of the Penal Code had no reference to the actual fine imposed but to fines that were permissible under the section under which the accused was convicted.

Held, that S. 67 refers to fines actually imposed and not to fines which the Court might have imposed. The sentence was reduced accordingly to six weeks' simple imprisonment.

Accused not represented.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Abdur Rahman, J.
19th August, 1941.

Srinivasa Aiyar *v.* Subramania Aiyar.
S.A. No. 182 of 1939.

Transfer of Property Act (*IV of* 1882), *S.* 60—*Amount remaining due—Construction.*

A father and son executed a mortgage in 1927 stipulating for the repayment of the money with interest at 12 per cent. per annum within two years, interest being payable every year. In default the mortgage bond provided that the mortgagors should pay interest at an enhanced rate of 18 per cent. on the arrears of interest then due and on the principal.

Subsequently in 1937, the mortgagors effected a partition agreeing therein to pay the mortgage debt in equal moieties. The son then died and his widow sold her half share to another person who paid off the half share of the debt with interest calculated at the enhanced rate provided in the bond.

In a subsequent suit by the mortgagee against the vendee of the other co-mortgagor's share, it was contended *inter alia* that the enhanced rate of interest was not enforceable and that credit must be given to him for the excess paid and endorsed on the bond calculated at the penal rate and that the mortgage debt was indivisible, and that the only amount due was the amount "remaining due" under S. 60 of the Transfer of Property Act.

Held, that the amount paid by the co-mortgagor on the footing of the enhanced interest was in the nature of a voluntary payment and cannot be taken into account in the suit against the other mortgagor's representative in interest. I.L.R. 15 Bom. 257 and I.L.R. 28 Mad. 555, referred to and relied upon.

M. S. Venkatarama Aiyar for Appellant.

S. Jagadisa Aiyar for Respondent.

K. S.

Venkataramana Rao, J. Athiappa Chettiar *v.* Ibramsa Rowther.
21st August, 1941. S.A. No. 257 of 1939.

Provincial Insolvency Act (V of 1920), Ss. 28 (6), 34, 44 and 47—Mortgagee's right to personal decree under O. 34, r. 6 of Civil Procedure Code (V of 1908)—Whether lost by order of absolute discharge in mortgagor's insolvency.

The mortgagor's liability to a personal decree in respect of a mortgage debt is a debt provable in his insolvency and the mortgagee is not entitled to apply under O. 34, r. 6 of the Civil Procedure Code for a personal decree against the mortgagor for any deficiency after an order of absolute discharge has been made in the mortgagor's insolvency.

I.L.R. (1940) Nag. 512 and A.I.R. 1938 Lah. 217, followed.

I.L.R. 54 All. 428 and I.L.R. (1939) All. 492, dissented from.

T. L. Venkatarama Aiyar and *M. V. Ganapathi* for Appellant.

R. Ramasubbu Aiyar for Respondent.

[*N.B.*—This question arising on similar facts in S. A. No. 1119 of 1938 has recently been referred by King, J., to a Bench.]

K.S.

The Chief Justice and Chandrasekhara Aiyar, J. Subbaroya Chettiar *v.* Debt Conciliation Board, Cuddalore and others.
21st August, 1941. C. M. P. No. 1548 of 1941.

Madras Debt Conciliation Act (XI of 1936), Ss. 7, 8 and 17—Board proceeding under S. 8—Conciliation not possible within twelve months—Debtor moving Board to dismiss application under S. 7 to enable him to file fresh application—Proper procedure—Lacuna in the Act pointed out.

When once a Debt Conciliation Board took an application on file and found no formal defects which would enable the Board to dismiss the petition under S. 7 and the Board proceeded to pass orders under S. 8 of the Act, it had thereafter no jurisdiction to go back and dismiss the petition under S. 7 and thereby evade the statutory duty of rejecting the application under S. 17 at the expiry of twelve months which would have precluded a fresh application.

The omission to give the Board power to extend its proceedings beyond twelve months is a defect in the Act which the Courts could not remedy and the remedy lay with the Legislature.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Petitioner.

S. Panchapagesa Sastri and *T. E. Ramabhadrachariar* for Respondents.

The Government Pleader (K. Kuttikrishna Menon) for the Debt Conciliation Board.

K.S.

[F.B.]

The Chief Justice, Krishnaswami Aiyangar and Chandrasekhara Aiyar, JJ.

25th August, 1941.

Hamidgani Ammal *v.* Ammasahibammal

S. A. No. 305 of 1938.

Civil Procedure Code (V of 1908), S. 47—Scope—Legal representative added in execution proceedings—If bound to set up his independent title—Subsequent suit asserting such right, if barred by S. 47, C. P. Code.

On a question whether the legal representative of a deceased person against whom a decree for specific performance by way of execution of a deed of sale of specific properties had been passed is bound to set up his independent title to the properties, when added as a party to that suit after the decree, in execution proceedings and whether on his failure to do so S. 47, Civil Procedure Code, operated as a bar to a separate suit on that title,

Held, that a separate suit is not barred as any claim on his independent title would constitute an attack on the decree itself which could not be allowed in execution proceedings.

I.L.R. 7 Mad. 255, 71 M.L.J. 511 and 71 M.L.J. 725, disapproved.

I.L.R. 30 Mad. 26, I.L.R, 32 Mad. 439 and I.L.R. (1940) Mad. 123, followed.

K. V. Ramachandra Aiyar for Appellant.

P. V. Rajamannar and *R. Sundaralingam* for Respondent.

K.S.

(F.B.)

The Chief Justice, Krishnaswami Aiyangar and Chandrasekhara Aiyar, JJ.

25th August, 1941.

Kutti Ammal *v.* Anganna Mudaliar and others.

S. A. No. 74 of 1941.

Civil Procedure Code (V of 1908), S. 2 (2)—"Decree"—Order rejecting appeal for non-payment of court-fee after dismissal of application for leave to appeal as pauper—If "decree"—If second appeal lies.

An order rejecting an appeal for non-payment of court-fee, after an application for leave to appeal as a pauper had been dismissed and the court-fee was not paid within the time given, is not a decree and no second appeal lies therefrom to the High Court. Decision of the Full Bench in S. R. No. 27375 of 1939, [(1940) 2 M.L.J. (N.R.C.) p. 12], followed.

T. R. Srinivasa Aiyar for Appellant.

D. Ramaswami Aiyangar and *T. P. Kannabhiran* for Respondent.

K. S.

Burn, J. Krishna Aiyar *v.* Krishna Ganapatigal.
12th August, 1941. **C. R. P. No. 1761 of 1939.**

Practice—Appeal—Pendency of application for review—If a reason for excusing delay in filing the appeal.

The presentation of an application for review is no bar to the filing of an appeal, and therefore the mere fact that an application for review was pending, did not prevent a person from appealing, and could not be a reason for excusing the delay in filing the appeal.

S. V. Rama Aiyangar for Petitioner.

R. S. Srinivasacharya and *K. V. Rajagopalan* for Respondent.

K.S.

Venkataramana Rao, J. Kuppuswami Pillai *v.* Sebastian.
13th August, 1941. **S.A. No. 952 of 1939.**

Madras Estates Land Act (I of 1908)*—Whole inam village—Tenant relinquishing possession on* 1-7-1935*—If loses occupancy rights conferred by Amending Act of* 1936.

A lessee of lands forming part of a whole inam village after giving up possession before 1st July, 1935 subsequently claimed occupancy rights conferred by the Amending Act of 1936.

Held: Once the land has been vacated by the tenant and the landlord or a subsequent lessee from him enters the land it must be deemed that there has been a relinquishment of possession by the former tenant so as to entitle the landlord to put a new tenant in. The fact that the tenant vacated the land in ignorance of his occupancy rights is immaterial, so long as the relinquishment was not influenced by anything done by the landlord. Accordingly a tenant who on the termination of the lease had voluntarily given up possession of the land on the 1st July, 1935 cannot claim any occupancy right by virtue of the Act of 1936 amending the Madras Estates Land Act.

B. Sitarama Rao, T. S. Narasinga Rao and *A. R. Krishnaswami* for Appellant.

The Advocate General (Sir A. Krishnaswami Aiyar), K. Subramania Aiyar and *K. S. Desikan* for Respondent.

K. S.

Abdur Rahman, J. Alagianayakathammal *v.* Abul Rahman Marakayar.
14th August, 1941. **S. A. Nos. 906 to 934 and 999 of 1939.**

Madras Estates Land Act (I of 1908)*, S.* 75*—Collector's decision for payment of rent in kind—Whether decree or order—Appeal only to District Judge—Absence of specific provision for further appeal to High Court—C. P. Code, S.* 100*—If applicable.*

A decision by the Collector under S. 75 of the Estates Land Act for payment of rent in kind is not a decree and there can be only one appeal *i.e.,* to the District Court. There is no provision in the Act which permits a further appeal to the High Court. As the decision of the Collector is in the nature of an order the appeal against such order must be regarded to be a continuation of the proceedings before the Collector and the decision by the District Court on appeal cannot be characterised as a decree. The provisions of S. 100, Civil Procedure Code cannot apply and no appeal is competent against the decision of the District Court.

U. Somasundaram for Appellants.

T. K. Subramania Pillai and *M. G. Shanmugham* for Respondents.

K.S.

N R C

Burn, J.
14th August, 1941.

Chenchuramiah *v.* Ramiah.
C. R. P. No. 1851 of 1939.

Limitation Act (*IX of* 1908), *S.* 20—*Part payment without mentioning whether it is for principal or interest—Effect.*

Lakshmi Naidu v. *Gunnamma*, I.L.R. 58 Mad. 418, has not been overruled by the decision of the Judicial Committee in *Ramshah* v. *Lal Chand*, I.L.R. 21 Lah. 470.

P. Srikantam for Petitioner.

G. Jagadisa Aiyar for Respondent.

K.S.

Chandrasekhara Aiyar, J.
15th August, 1941.

Lakshminarayana *v.* Suryanarayana.
C. R. P. No. 1418 of 1939.

Practice—Decree in suits for partition—Power of Judge to pass appropriate orders as to shares etc., till decree is engrossed on stamp paper and signed by the Judge.

So long as the decree was not engrossed on stamp paper and signed by the Judge as it should be done in suits for partition, the suit can be said to be really pending with the consequence that the Judge has got power to pass appropriate orders as regards the shares, or the allocation of properties or payment of compensation to equalise value or the adjustment of any equities.

B. Jagannadha Das for Petitioner.

B. V. Ramanarasu for Respondent.

K.S.

Abdur Rahman J.
18th August, 1941.

Appalaswami *v.* Municipal Council, Vizianagaram.
S. A. No. 91 of 1939.

Contract Act (*IX of* 1872), *S.* 65—*Third party receiving advantage under a contract discovered to be void—Liability to return or make compensation.*

The Municipal Council of Vizianagaram passed a resolution on 28-10-1925 agreeing to give a plot of land on lease for 5 years at Rs. 10 per month to defendants 1 and 2 who wished to erect a theatre. Possession of the land was delivered in November, 1925, and the hall was constructed by May, 1926. The lease was to terminate in November, 1930, but the lease deed was not registered till 13th December, 1927, and even then it did not comply with the statutory requirements and therefore was declared by the Court to be void. The 3rd defendant who had in the meanwhile advanced money for the construction of the hall was let into possession of it, which he was to have for 22 months. He was also to make a further advance. The third defendant took the hall with the object of exhibiting pictures. The original lease had provided that if the lessees were to let the hall to others for staging dramas or exhibiting films they should pay the lessor a rent of Rs. 5 for every play and Rs. 2 for every cinema performance. The Municipal Council sued defendants 1, 2 and 3, for recovery of rent or in the alternative for damages for use and occupation or for compensation under S. 65 of the Contract Act. Without deciding whether the transaction with the third defendant was a mortgage or a lease,

Held, the lease having been found to be void there is no assignment of the lease to the 3rd defendant. Though a claim for damages for use and occupation can only be made against parties like defendants 1 and 2 who held possession permissively and not against a party like the 3rd defendant to whom possession was subsequently transferred by the persons in such permissive possession, if such third party is found to have received an

advantage through a contract which is discovered to be void or which has subsequently become void he would be bound to restore it or to make compensation for it to the person from whom he received it. The third defendant having had the use of the site belonging to the Municipal Council is under a liability to the council under S. 65 of the Contract Act.

I.L.R. 9 All. 340, applied.

P. Somasundaram for Appellant.

V. Govindarajachari for Respondent.

K.S.

Horwill, J.
18th August, 1941.

Raju Chettiar *v.* Doraikannu Ammal.
Crl. R. C. No. 350 of 1941
(Crl. R. P. No. 332 of 1941).

Criminal Procedure Code (V of 1898), S. 386 (b)—Sentence of fine and in default imprisonment—Direction that fine if recovered should be given to complainant as compensation—Default in payment of fine and consequent serving of term of imprisonment—Subsequent order for realisation of fine by sale of movables—If proper.

Though the normal course is not to order recovery of fine after the full term of imprisonment in default of payment has been served, where there is a direction for the payment of the fine if recovered to be paid as compensation to the complainant, an order for realisation of the fine by the sale of the articles taken from the accused at the time of his arrest is not improper.

B. T. Sundararajan for Petitioner.

C. D. Venkataraman for *The Crown Prosecutor.*

A. S. Sivakaminathan for Respondent.

K.S.

Somayya, J.
19th August, 1941.

Chema Reddi—Petitioner.
C. M. P. Nos 3269 and 3901 of 1941.

Civil Procedure Code (V of 1908), O. 47, r. 1—First appeal heard by two judges—Review application—Only one of the judges available—If can be heard by him alone or if it should be by a Bench of two Judges.

Where after the disposal of an appeal by a Bench of two Judges an application for review is made when only one of the Judges who heard the appeal remained attached to the Court, the application can be heard by the remaining Judge alone. I.L.R. 16 Cal. 788 and 9 I.C. 532, relied on. It is the invariable practice of the Madras High Court that even in first appeals the application for review is heard and decided only by the Judges who heard the appeal or where one of them is absent, by the other Judge sitting alone.

V. Kachapeswara Aiyar, P. V. Rajamannar and *K. Subba Rao* for Petitioners.

K. S.

The Chief Justice and
Chandrasekhara Aiyar, J.
20th August, 1941.

Desai *v.* Bala Bhai & Sons.
O. S. A. No. 11 of 1941.

Presidency Towns Insolvency Act (III of 1909), Ss. 9 and 13—Notice of suspension of payment alleged as act of insolvency—If to be set out in petition itself or may be in affidavit in support of it.

Where the petition states that the debtor has given notice to his creditors that he has suspended or that he is about to suspend payment of his debts

and the affidavit verifying the petition shows that this is in fact the case there is compliance with the law's requirements. The petition and the affidavit should be read together and if the petitioning creditor sets out in sufficient detail the facts on which he is relying, the debtor can have no complaint whether the information is contained in the petition or in the affidavit.

I.L.R. 13 Rang. 686, not followed.

B. K. B. Naidu and *S. Athmanathan* for Appellant.

T. V. Srinivasan for Respondents.

K. S.

Horwill, J.
21st August, 1941.

Moongan and others *v.* Roshan Ali Sahib.
Cr. R. C. No. 316 of 1941
(Cr. R. P. No. 300 of 1941).

Criminal trial—Misjoinder of accused—Conviction if to be set aside—Presumption as to prejudice to accused.

Where there was no intention or object common to two sets of persons cutting trees in different parts of a forest, trying them together will amount to misjoinder of parties. Where the accused have been so tried jointly prejudice should be presumed, unless it is quite certain that there could have been none. Where the impugned procedure works actual injustice to the accused the convictions should be set aside and separate trials ordered. (Authorities discussed.)

K. S. Jayarama Aiyar for *G. Gopalaswami* and *V. V. Radha Krishnan* for Petitioners.

V. T. Rangaswami Aiyangar for *K. S. Sundaram* and *M. R. Ramachandra Pant* for Respondent.

Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Chandrasekhara Aiyar, J.
22nd August, 1941.

Timmi Reddi *v.* Krishna Pillai.
C. R. P. No. 10 of 1941.

Madras Hereditary Village Offices (*Act III of* 1895), *Ss.* 13 *and* 21—*Suit for arrears of emoluments—Civil Court's jurisdiction.*

Where plaintiff a karnam of a village in a proprietary estate sued in the District Munsiff's Court for arrears of karnam meras which constituted the emoluments attached to the office,

Held, that the jurisdiction of the Civil Court to try such a suit was not barred as the plaintiff did not allege in his plaint that he was entitled to hold that office on the date of his plaint and as there was no relief claimed for a declaration to that effect when alone the Civil Court's jurisdiction would be ousted.

Kasturi Seshagiri Rao for Petitioner.

V. N. Sarma for *Ch. Raghava Rao* for Respondent.

K. S.

Lakshmana Rao, J.
25th August, 1941.

D.N.C. & Co., *v.* Hazi Fazal Hussain.
C. R. P. No. 2124 of 1940.

Civil Procedure Code (*V of* 1908), *S.* 10—*Same parties—Suit against a partner of a firm in respect of a debt due by the firm—Prior suit by legal representatives of a deceased partner for rendition of accounts—Whether*

between the same parties or between parties under whom they or any of them claim.

The petitioner filed a suit in the City Civil Court Madras, against the respondent who was the surviving partner of a firm, on the basis of a settlement of account, in respect of dealings which the firm had with the petitioner. In a previously instituted suit for accounts in the City Munsif's Court, Cawnpore, by the legal representatives of a deceased partner of the firm, the present petitioner who was admittedly a third party to the partnership was impleaded as a defendant along with the surviving partner on the ground that he was liable to render accounts of all the dealings which the firm had with the petitioner in his capacity as agent of the firm. The plaintiff and the defendant in the Madras suit were arrayed as defendants in the Cawnpore suit, the one issue common to both the suits being whether the settlement of accounts set up by the petitioner was true and binding. An application under S. 10, C. P. Code, was filed by the respondent in the City Civil Court to stay the suit pending the disposal of the Cawnpore suit, and this was allowed. In revision, held that the plaintiffs in the Cawnpore suit being the legal representatives of a deceased partner the parties to both the suits could not be treated as the same and therefore S. 10, C. P. Code, was inapplicable.

A. S. Raghava Rao for Petitioner.

M. S. Sarma and *D. R. Krishna Rao* for Respondent.

K.C.

Wadsworth and Patanjali Sastri, JJ. — Gavappa *v.* Gundappa and another.
25th August, 1941. — **A. S. No. 1 of 1939.**

Madras Agriculturists' Relief Act(IV of 1938)—Question whether defendant was "agriculturist" and if so he was entitled to the benefits under the Act —Decision that he was not "agriculturist"—Reversal on appeal—Proper procedure for working out the benefits under the Act.

The trial Court held that the defendant was not an agriculturist and therefore not entitled to any benefit under Act IV of 1938. The appellate Court reversed the decision and held that he was an agriculturist entitled to the benefits of the Act. On the question whether the suit should be remanded and the appellant given a fresh opportunity to adduce oral and documentary evidence as to appropriations of payments made by him,

Held, that when there was a definite issue framed whether the defendant was an agriculturist and to what benefits he was entitled under the Act, it was his duty to have adduced at the trial itself all evidence regarding this issue and other issues framed in the suit. The appellate Court reversing the finding of the trial Court and holding that the defendant was an agriculturist can itself go into the materials existing on record and give him such benefit as he is entitled to under the Act, and avoid a remand.

V. S. Narasimhachar and *K. S. Chakrapani Rao* for Appellant.

Kasturi Seshagiri Rao for Respondent.

K. S.

Venkataramana Rao, J. — Razack *v.* Hussain.
25th August, 1941. — **A. A. A. O. No. 167 of 1939.**

Insolvency—Order closing insolvency proceedings—If tantamount to order of discharge—Presumption.

Where all the available property of the insolvent was realised and the sale proceeds distributed among the creditors and the insolvency proceedings

were closed but the order of discharge was not produced and the papers were not available from the Courts below,

Held, that when the Court passed an order closing the insolvency proceedings it must also be presumed to have passed an order discharging the insolvent, and even if it did not, the order closing the proceedings must be deemed to be tantamount to a discharge.

K. S. Rajagopalachari and *V. Seshadri* for Appellant.

A. Sundaram Aiyar for Respondent.

K. S.

Wadsworth and Patanjali Sastri, JJ,
26th August, 1941.

Subramanian Chettiar *v.* Miakhan Rowther.
C.R.P. No. 199 of 1941.

Madras Agriculturists' Relief Act (IV of 1938)*—Non-agriculturist surety —If entitled to claim discharge* pro tanto *with agriculturist principal-debtor.*

Where the discharge of a principal debtor is brought about not by any voluntary act of the creditor but by the operation of a statute subsequently passed, the surety cannot claim discharge, *pro tanto* with the principal debtor. S. 128 of the Contract Act defines the obligation of the surety on the date of the contract of guarantee. Accordingly a non-agriculturist surety is liable for the whole amount of the debt even though the agriculturist principal-debtor is only liable for the debt as scaled down in accordance with Act IV of 1938.

T. P. Gopalakrishnan for Petitioner.

Mahomed Ibrahim for Respondent.

K.S.

Somayya, J.
27th August, 1941.

Venkatasuubbiah *v.* Venkatasubbiah.
S.A. No. 668 of 1939.

Provincial Insolvency Act (V of 1920), *S.* 37*—Annulment of adjudication —Vesting of debtor's property in person appointed under S.* 37*—Sale of such property in execution without impleading the appointee—Validity.*

Where on annulment of adjudication of the insolvent the property of the debtor vested in the person appointed by the Court under S. 37 of the Provincial Insolvency Act, the only person entitled to represent the estate is the appointee. Accordingly a Court sale in execution without having such appointee on the record is a sale without the estate being represented in the execution proceedings and the purchaser gets no title (Case-law discussed).

T. K Srinivasathathachari and *T. T. Srinivasan* for Appellant.

Kasturi Seshagiri Raa for Respondent.

K.S.

Venkataramana Rao, J.
27th August, 1941.

Subbarayudu *v.* Venkatasubbamma.
C. M. S. A. No. 266 of 1940.

Civil Procedure Code (V of 1908), *S.* 60, *Cl.* (1) (c)*—Exemption from attachment.*

Where it is proved that the attached house is the only house belonging to an agriculturist debtor where he keeps his implements of agriculture and lives, even though the house is situated in a village and away from the

fields, he is entitled to claim exemption from attachment for the house as an agriculturist. I.L.R. 1937 Mad. 777 (F.B.), applied.

K. Krishnamurthy for Appellants.

K. Kotayya for Respondents.

K. S.

Burn, J.
28th August, 1941.

Vathan—Accused.
Crl. R.C. Nos. 547 and 548 of 1941
(Case referred Nos. 33 and 34 of 1941).

Criminal Procedure Code (V of 1898), *S.* 123—*Substantive sentence of imprisonment—If can be made to take effect on expiry of imprisonment imposed under S.* 123, *Cr. P. Code.*

An order directing a substantive sentence of imprisonment to take effect on the expiry of the period of imprisonment imposed under S. 123, Cr. P. Code, is illegal. The substantive sentence must take effect from the date on which it is pronounced.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

Accused not represented.

K.S.

[F.B.]
The Chief Justice, Krishnaswami Aiyangar and Chandrasekhara Aiyar, JJ.
28th August, 1941.

Kanakaratnam *v.* Narasimha Rao.
Appeal No. 426 of 1938.

Hindu Law—Adoption—Widow adopting with consent of sapinda—*Motive of widow—Effect on validity of adoption.*

In South India when once a widow has obtained the consent of the nearest *sapinda*, her motive in making the adoption (for instance, to spite the junior widow) is quite irrelevant and does not affect the validity of the adoption. 37 L.W. 729, overruled.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

Sir Alladi Krishnaswami Aiyar and *B. V. Subramaniam* for Respondent.

K. S.

Abdur Rahman, J.
29th August, 1941.

Peria Negamam Sri Lakshmi Vilasa Draviya Sahaya Nidhi *v.* Varalakshmi Ammal.
S.A. No. 483 of 1941.

Limitation Act (IX of 1908), *Arts.* 120 *and* 62—*Loan by* nidhi *on the security of shares in* nidhi—*Sale of shares and adjustment towards loan—Balance left over—Claim for—Limitation.*

Where a *nidhi* advanced a loan on the security of shares in the *nidhi* and subsequently sold such shares and adjusted the proceeds thereof towards the loan, a claim by the debtor or his representative for the balance left over is governed by Art. 120 and not Art. 62 of the Limitation Act. The jural relationship between the parties is that of pawner and pawnee and the claim is not one for money had and received by the *nidhi* for the use of the debtor.

I.L.R. 44 Mad. 823, distinguished.

B. V. Viswanatha Aiyar for Appellant.

K. V. Ramachandra Aiyar and *S. Thiyagaraja Aiyar* for Respondent.

K. S.

(F.B.)

The Chief Justice, Krishnaswami Aiyangar and Chandrasekhara Aiyar, JJ.
1st September, 1941.

Ramanathan Chettiar *v.* Sellakumara Gounder.
A. S. No. 161 of 1938.

Provincial Insolvency Act (V of 1920), S. 28 (2)—Leave under—Whether necessary for a suit under S. 53 of the Transfer of Property Act (IV of 1882) by a creditor after the adjudication, to set aside an alienation by the debtor.

S. 28 (2) of the Provincial Insolvency Act applies only to suits in respect of the property of the insolvent which has vested in the Official Receiver. But where the property has been alienated by the debtor before his adjudication and a suit under S. 53 of the Transfer of Property Act by a creditor to set aside the same is filed, S. 28 (2) of the Provincial Insolvency Act is not applicable and the suit is maintainable without leave of the Insolvency Court. 56 M.L.J. 458, approved. If the Official Assignee or Receiver is impleaded as a party to the suit, leave of the Insolvency Court may be necessary.

K. V. Ramachandra Aiyar and *T. N. Sundaresan* for Appellant.

R. Sundaralingam for Respondent.

K.S.

[F. B.].

The Chief Justice, Krishnaswami Aiyangar and Chandrasekhara Aiyar, JJ.
1st September, 1941.

Vasireddi Venkayya v. Gopu Sriramulu & others.
S. A. No. 803 of 1938.

Hindu Law—Adoption—Assent of sapinda *to adoption by widow in general terms—Adoption in pursuance of—When valid.*

Where there is an assent by a *sapinda* to a widow adopting any boy she liked at any time she liked, the assent expressed in such general terms is valid and an adoption made in pursuance of such assent shortly after the giving of the assent (within five months in the present case) and before there was any material change in the circumstances of the family, is valid. 1 L.W. 511 followed.

The question as to the effect of the lapse of time and change of circumstances in the family on efficacy of assent was left open.

V. Govindarajachari and *T. G. Krishnamurthi* for Appellant.

K. Kameswara Rao for Respondents.

K.S.

Venkataramana Rao, J. Enayathulla *v.* Jeelani.
5th August, 1941. **C. C. C. A. No. 4 of 1940.**

Married Women's Property Act (III of 1874)—S. 6—Applicability to policy of insurance effected in 1905 by a Mahomedan on his life for the benefit of his children.

S. 6 of the Married Women's Property Act is applicable to a policy of insurance effected in 1905 by a Mahomedan male on his own life for the benefit of his wife and children. (I.L.R. 37 Mad. 483), relied on.

If S. 6 of the Act were to apply, a trust is created in favour of the several persons for whose benefit the policies were effected though the interest taken by them was contingent.

Raffiudin Ahmad for Appellant.

O. K. Nambiar and *Short Bewes & Co.* for Respondents.

K.S.

Burn, J. Madanapalli Lakshmikantha Nidhi *v.* Gopalu.
12th August, 1941. **C. R. P. Nos. 1738 of 1939.**

Usurious Loans Act (X of 1918), S. 3—Application of the provisions of the Act—Reasons for, if should be recorded.

The Usurious Loans Act, S. 3 (1) nowhere states that the Court must set out its reasons for applying the provisions of the Act.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Petitioner.

Respondents not represented.

K. S.

Burn, J. Ismal Rowther *v.* Ahmed Rowther.
15th August, 1941. **C. R. P. No. 1728 of 1939.**

Evidence Act (I of 1872), S. 34—Entries in books of account—Sufficiency of as proof of discharge of liability.

The clerk of the defendant had given to the plaintiff a chit showing that on 1st October, 1935 the defendant owed the plaintiff Rs. 177-2-1. In a claim for the amount, the defendant produced his accounts showing that after 1st October, 1935 there had been further dealings between him and the plaintiff, as the result of which he owed the plaintiff nothing.

Held, that the entries in the accounts can be accepted as sufficient proof of the defendant's plea of discharge. There is nothing in S. 34 of the Evidence Act to indicate that entries in books of account may not by themselves be sufficient for this purpose, though they are not, by the terms of the section sufficient to lay upon any person a liability.

T. P. Gopalakrishnan for Petitioner.

V. Somasundaram for Respondent.

K. S.

King, J. Subbamma *v.* Ankireddi.
15th August, 1941. **S. A. No. 1171 of 1938.**

Arbitration—Examination of witnesses essential for decision—Failure of arbitrator to examine witnesses in arriving at a finding—If misconduct invalidating award.

The question of the validity of a settlement deed which was impugned on the ground of undue influence was referred to arbitration. The award

said that the deed was executed under undue influence and was at its inception invalid.

Held, that such an opinion could not be properly arrived at without the examination of witnesses and the arbitrator's failure to examine witnesses amounted to misconduct and consequently the finding was vitiated.

K. Kotayya for Appellant.

A. Ragaviah for Respondent.

K. S.

Chandrasekara Ayyar, J. Venkatappa Naidu *v.* Annayya Reddi.
18th August, 1941. **S. A. No. 270 of 1939.**

C. P. Code, (V of 1908), *S.* 149—*Appeal filed insufficiently stamped—Discretion of Judge to reject without calling on or giving time to appellant to pay deficient court-fee—O. 7, r.* 11—*Not applicable to appeals.*

Under S. 149 of the Civil Procedure Code the District Judge has a discretion to allow deficiency in court-fees on an appeal to be made up and this necessarily means that he could exercise the discretion the other way round and say that it was not a fit case for showing any indulgence to the appellant. The provisions of O. 7, r. 11 are not applicable to appeals.

Decision in 27 M.L. J. 677 held not to be *obiter* and followed.

D. R. Krishna Rao, for Appellant.

N. Somasundaram for Respondent.

K.S.

Venkataramana Rao, J. Seetarama Aiyar *v.* Subba Aiyar.
19th August, 1941. **A. A. A. O. No. 115 of 1939.**

Limitation Act (IX of 1908), *Art.* 180—*Suit for possession by purchaser of immoveable property at sale in execution—Limitation.*

Where it is held that a decree is executable and the sale in execution is confirmed and an appeal against such order is dismissed for default and an application for the restoration of the appeal is also made and dismissed and another appeal against such dismissal for default is preferred to the High Court and ultimately dismissed, an application by the purchaser of immoveable property at the sale in execution for delivery of possession, made within three years of the dismissal of the appeal by the High Court is within time. The sale did not become absolute till the last order of the High Court dismissing the appeal against the order refusing to restore the appeal dismissed for default was made. (I.L.R. 61 Cal. 945, P.C.), relied on.

R. Srinivasa Aiyangar for Appellant.

K. Desikachari for Respondent.

K.S.

Venkataramana Rao, J. Kunchu Nayar *v.* Chethappan Nayar.
25th August, 1941. **A.A.A.O. No. 209 of 1939.**

Civil Procedure Code, (V of 1908), *S.* 48—*Application barred under—If delay can be excused under S.* 5, *Limitation Act.*

Where an application is barred under S. 48, Civil Procedure Code, the Court has no jurisdiction to excuse delay under S. 5 of the Limitation Act which is not applicable to a petition under S. 48, Civil Procedure Code.

P. Govinda Menon for Appellant.

B. V. Viswanatha Aiyar (Amicus curiae).

K.S.

(F.B.)

The Chief Justice, Krishnaswami Aiyangar and Chandrasekhara Ayyar, JJ.
25th August, 1941.

In the matter of a First Grade Pleader.
Reference No. 21 of 1941.

Legal Practitioner—Accepting instructions from a party after receiving instructions from the opposite party—Propriety—Civil Rules of Practice (Madras), r. 20.

Legal Practitioners cannot accept instructions from a party to a suit when they have already received instructions from the opposite party unless the opposite party consents or the pleader is allowed by the Court to act for the other party. This is in fact laid down in r. 20 of the Civil Rules of Practice of the Madras High Court.

The Advocate-General (Sir A. Krishnaswami Aiyar) in support of the motion.

V. Suryanarayana for the Pleader.

K.S.

Burn, J.
28th August, 1941.

Venkatachalam Chetty, Accused.
Crl. Appeal No. 357 of 1941.

Penal Code (XLV of 1860), *Ss.* 302 *and* 328—*Victim recovering from* dhatura *poison and then dying of pneumonia—Conviction of accused for murder—Propriety.*

Where the death of the victim was due not to the *dhatura* poison found to have been administered by the accused, but to pneumonia consequent upon exposure occasioned by coma or unconsciousness produced by the poison, and in fact the victim died of pneuòmina after recovering from the *dhatura* poisoning the accused ought to be convicted not under S. 302 but under S. 328 of the Indian Penal Code.

I.L.R. 45 All. 557, distinguished.

Accused not represented.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

The Chief Justice and Chandrasekhara Ayyar, J.
2nd September, 1941.

Nallappa Goundan, Accused.
Crl. R. C. No. 163 of 1941.

Criminal Procedure Code (V of 1898), *S.* 195—*Defamation by person in the witness box—Complaint—If requires sanction of Court.*

The provisions of S. 195, Criminal Procedure Code do not apply to defamation and a person who is defamed by a witness when in the witness box is at liberty to file a complaint against the defamer under the Penal Code and sanction of the Court before which the complainant was defamed is unnecessary.

G. Gopalaswami for Petitioner.

The Public Prosecutor (V.L. Ethiraj) for the Crown.

K.S.

The Chief Justice and Chandrasekhara Ayyar, J.
3rd September, 1941.

Official Assignee, Madras *v.* D'Silva.
O. S. A. No. 12 of 1941.

Presidency Towns Insolvency Act (III of 1909), *Ss.* 52 *and* 60—*Insolvent a Government servant receiving salary less than Rs.* 100—*Order for payment of portion for benefit of creditors—When can be passed—Civil Procedure Code (V of* 1908), *S.* 60.

Although future salary of an insolvent did not vest in the Official Assignee, the salary when received by the insolvent would become his property and vest in the Official Assignee. After receipt of the salary the insolvent can be called upon to pay a portion of it for the benefit of his creditors. Though under S. 52 of the Presidency Towns Insolvency Act after acquired properties of the insolvent are divisible among the creditors there is no provision apart from S. 60 empowering the Official Assignee to recover such salary by a prospective order. Such an order under S. 60 of the Presidency Towns Insolvency Act could not be obtained if the salary was within Rs. 100. But this does not affect S. 52 of the Presidency Towns Insolvency Act and it is always open to the Official Assignee to apply for an order for payment of a portion of the money after its receipt by the insolvent. But having regard to the limit imposed by S. 60 of the Act read with S. 60 of the Civil Procedure Code such an order is not likely to be passed except in exceptional circumstances.

K. V. Ramachandra Aiyar, M. A. Srinivasan and *S. Swaminathan* for Appellant.

S.J.S. Fernandes for Respondent.

K.S.

Venkataramana Rao, J.
4th September, 1941.

Murugesa Mudali *v.* Ethiraja Mudali.
S. A. Nos. 346 to 355 of 1939.

Madras Estates Land Act (I of 1908), *Ss.* 3(5), *77-A and* 112—*Proceedings initiated by one co-sharer without joining others—Validity.*

The term, landholder, in Ss. 77-A and 112 of the Madras Estates Land Act must have the same meaning as under S. 3 (5) and in the case of a divided family it is not open to the elder brother to represent his minor brother and act as his guardian and it is not competent for one co-sharer to initiate proceedings under S. 112 without joining the other co-sharer.

K. Rajah Aiyar and *V. Seshadri* for Appellant.

S. Jagadisa Aiyar and *G. R. Jagadisan* for Respondent.

K.S.

The Chief Justice and Chandrasekhara Ayyar, J.
5th September, 1941.

Province of Madras by the Collector of Madras v. Paidanna and sons.
A. S. No. 102 of 1941.

Madras General Sales Tax Act (IX of 1939), *First sales of goods manufactured in the Province—Tax on, is in the nature of excise duty and therefore* ultra vires *the Provincial Government—Government of India Act,* 1935 *—Federal List Entry No.* 45 *and Provincial List Entry No.* 48.

Entry No. 45 in the Federal List and Entry No. 48 in the Provincial List can be reconciled by reading into Entry No. 48 of the Provincial List a power to tax all sales subsequent to the sale by the manufacturer or producer, that is, when the property in the goods has passed beyond the manufacturer or producer and the goods have become part of the general stock of the province. Notwithstanding that the tax imposed by the Madras General Sales Tax Act is based on turnover, it is in fact a tax on sales and in so far as it imposes a tax on first sales of goods manufactured or produced within the province, it is in the nature of excise duty and therefore *ultra vires* the Provincial Legislature.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *N. Rajagopala Aiyangar* for Appellant.

T. R. Venkatarama Sastri instructed by King and *Partridge, V. Govindarajachari* and *V. V. Raghavan* for Respondent,

K.S.

Chandrasekhara Ayyar, J. Abdul Huq Saheb *v.* Usman Khan Sahib.
18th August, 1941. **S.A. No. 236 of 1939.**

Limitation—Sale of immovable property—Promissory note executed by vendee for balance of price due—Payments towards the promissory note and endorsement of acknowledgments—If can save limitation for enforcing vendor's lien.

On a sale of some immovable property the vendee executed a promissory note for the balance of purchase price due to the vendor. Subsequently payments were made towards the amount due under the promissory note and endorsed on the note. A decree was obtained for the balance remaining due under the promissory note. In a subsequent suit to enforce the vendor's lien against another purchaser of the properties in execution of a mortgage decree against the original vendee, twelve years after the original suit,

Held, that the suit was barred by limitation under Art. 132. The acknowledgment of liability in respect of the promissory note cannot save the statutory charge from the bar of limitation. Where two remedies flow either by operation of law or by agreement between the parties out of one and the same transaction and the remedies are separate and distinct in their scope and in their essential features anything said or done to save one of the remedies from the bar of limitation cannot operate by itself to save the other also. 7 Mad. 392; 34 I.C. 417 and 25 Cal. 844 (P.C.), distinguished.

K. V. Sesha Aiyangar for Appellant.

K. S. Narayana Aiyangar for Respondents.

K.S.

Lakshmana Rao, J. Mallayya *v.* Jagannadhamma.
18th August, 1941. **C.R.P. No. 343 of 1940.**

Suit valuation—Suit for partition by persons in joint possession—Valuation for purposes of jurisdiction.

In a suit for partition by persons in joint possession the valuation for the purpose of jurisdiction is the actual market value of the property in suit. 50 Mad. 646, 56 M.L.J. 394 and (1939) 2 M.L.J. 226, relied on. Accordingly where the value of the plaintiffs' shares will be not less than Rs. 10,000 the suit should be instituted in the Subordinate Judge's Court as the District Munsif has no jurisdiction to entertain it.

G. Chandrasekhara Sastri for Petitioner.

P. Satyanarayana Rao and *M. R. Raju* for Respondents.

K.S.

Somayya, J. Chandammal *v.* Ramakrishna Ayya.
19th August, 1941.

S.A. No. 789 of 1939.

Contract Act (IX of 1872), S. 23—Consideration for promissory note, non-prosecution for cheating—Enforceability of the promissory note.

In the case of offences specified in S. 345 (2) of the Criminal Procedure Code the matter may be lawfully compounded before it goes to Court and a promissory note taken in consideration therefor is not void under S. 23 of the Contract Act and is therefore enforceable.

K. Rajah Aiyar and *S. Srinivasachari* for Appellant.

K. Bhimasankaran and *P. Somasundaram* for Respondent.

K.S.

N R C

The Chief Justice and Chandrasekhara Ayyar, J.
20th August, 1941.

Swaminatha Pillai *v.* Krishna Padayachi.
L.P.A. No. 36 of 1940.

*Transfer of Property Act (IV of 1882), S. 41—Applicability of principles to movables—Y, one of the judgment-debtors a surety—Y discharging decree and getting it transferred to his benamidar—*Bona fide *purchaser of decree for value from benamidar—Right to execute against* Y*—C. P. Code, O. 21, r. 16—Circumvention—Effect.*

Y was a surety for *X* and a decree was obtained against both. To avoid execution proceedings against himself *Y* paid the decree-holder, but in order to recover the amount from the principal debtor without recourse to a fresh suit he ararnged with the decree-holder to transfer the decree to *M*, a benamidar for himself. *M* sold the decree to *K* who acted in good faith for consideration. *K* sought to execute the decree against *Y*,

Held, that *M* being *Y's* benamidar the transfer of the decree to him meant the transfer to *Y* himself and *Y* was guilty of what in law amounts to a fraud to circumvent the provisions of O. 21, r. 16 of the Civil Procedure Code.

The principle embodied in S. 41 of the Transfer of **Property Act** can be applied to movable property also. Having allowed *M* to hold himself out as the holder of the decree, *Y* cannot be preferred to *K* who bought the decree for valuable consideration and in good faith. Accordingly *Y* cannot avoid liability to pay the decretal amount to *K*.

T. V. Muthukrishna Aiyar for Appellant.

A. C. Sampath Aiyangar for Respondent.

K.S.

The Chief Justice and Chandrasekhara Ayyar, J.
21st August, 1941.

Palaniappa Chettiar *v.* Velappa Chettiar.
L.P.A. No. 24 of 1940.

Mortgage—Earlier mortgage—How far shield against later mortgage—Right if affected by law of limitation.

An earlier mortgage can be held as a shield as against a subsequent mortgage. The right is not affected by the law of limitation and can be set up even after the expiry of 12 years.

41 M.L.J. 399, A.I.R. 1929 Mad. 465, followed. 50 Mad. 626, not followed.

K. V. Krishnaswami Aiyar and *N. R. Govindachari* for Appellant.

T. K. Sundararaman for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
29th August, 1941.

Muthukaruppan Chettiar v. Subbiah Chettiar.
Appeal No. 22 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 7, 8 *and* 4 (*d*)—*Scope.*

On 1—10—1937 there was a debt already contracted on the security of municipal house property alone. By S. 4 (*d*) such debt is excluded from the operation of the Act. The addition of security of other property at a date after the Act came into force cannot retrospectively make it a debt contracted on the security of property other than municipal property so as to bring into force Ss. 7 and 8 of the Act and exclude S. 4 (*d*).

K. Rajah Aiyar and *N. G. Krishna Aiyangar* for Appellant.

R. Gopalaswamy Aiyangar for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. 1st *September*, 1941.

Venkata Reddi *v.* Venkatanarayana.
A.A.O. No. 543 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 8 (1) *and* (3)—*Scope.*

A debtor is not entitled under S. 8 of Act IV of 1938 to split up a debt into its component parts and have scaled down one part under clause (3) and another part of the debt under clause (1).

P. Chandra Reddi and *R. Ramalinga Reddi* for Appellant.

J. R. Gundappa Rao for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. 2nd *September*, 1941.

Sri Chittoori Narayanamma *v.* Vankina Venkatachallam.
A.S. No. 71 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 8—*Scope—Question of benami for creditor, if can be gone into—Mortgage by son in renewal of pre-partition debt on promissory notes by father—Debtors, if same.*

The question of benami cannot be gone into in determining the point whether a creditor is the same within the meaning of the explanation to S. 8 and the creditor mentioned in the document, evidencing the liability to be scaled down, is the creditor for purposes of the Act. Where a mortgage was executed by a son after partition in discharge of pre-partition debts evidenced by promissory notes executed by his father, the debtors in respect of the two liabilities are not the same.

I.L.R. (1941) Mad. 248 and (1940) 2 M.L.J. 756 referred to.

A. Lakshmayya for Appellant.

V. Govindarajachari for Respondent.

B.V.V.

Venkataramana Rao, J. 3rd *September*, 1941.

Ballamkondu Venkatiah and another *v.* Poli Chenchamma and three others.
S.A. No. 737 of 1939.

Registration of Settlement Deed—Fraud on Registration law—Settlement deed not given effect to—Settlor's suit for declaration of title—If Courts can give relief.

Where both the settlor and the settlee got registered a settlement deed by including an item of property not owned by the settlor for purpose of getting registered the settlement deed in a Sub-Registry wherein that item was situate but no effect was given to the Settlement Deed and the settlor continued in possession of the lands and was paying the kist therefor and there was no transfer of patta in favour of the settlee,

Held, that a suit by the settlor against the settlee and his transferees for a declaration of her title is maintainable since the fraud was not carried into effect.

T. K. *Srinivasathathachariar* and *T. T. Srinivasan,* for Appellants.

K. Umamaheswaram and *P. Ramalinga Reddi,* for Respondents.

K.C.

Wadsworth, J. 4*th September*, 1941.

Thirumayee Ammal *v.* Muthu Mooppanar.
C.R.P. No. 1045 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 4 (*h*)—*Principal of "debt or debts"—Meaning.*

The argument, that for the purpose of S. 4 (*h*) of Madras Act IV of 1938, the principal of the "debt or debts" means the original principal of some antecedent debt or debts, cannot be accepted.

L. V. Krishnaswamy Aiyar for Petitioner.

T. L. Venkatarama Aiyar for Respondent.

K.S.

Chandrasekhara Ayyar, J. Krishnayya *v.* Lakshmidevamma.
5th September, 1941. **Cr. P. No. 132 of 1940.**

Madras Debt Conciliation Act (XI of 1936), S. 25—Conduct of defendant in filing petition before Board improper or fraudulent—If ground for refusal of stay application under S. 25.

The prohibition under S. 25 of the Debt Conciliation Act is absolute and the Courts have no power to proceed with a suit on the ground that the conduct of the defendant in filing a petition before the Board was improper or fraudulent.

V. Suryanarayana for Petitioner.

P. Somasundaram and *P. Suryanarayana* for Respondent.

K.S.

Venkataramana Rao, J. Ramanathan Chettiar, *In re.*
8th September, 1941. **S.R. No. 16499 of 1941.**

Court-Fees Act (VII of 1870), Sch. II, Art. 1 (d) (i) (Madras Amendment)—Order directing a rateable decree-holder to refund sum of Rs. 987-3-11 received by him—Suit in which sale proceeds realised valued at more than Rs. 1,000—Revision petition—Proper court-fee.

A memorandum of civil revision petition presented to the High Court against an order directing a decree-holder to refund a sum of Rs. 987-3-11 received by him in rateable distribution is liable to pay a court-fee of Rs. 10 and not Rs. 5 where the value of the suit wherein the sale proceeds were realised in execution of the decree is above the value of Rs. 1,000.

K. S. Ramabhadra Aiyar for Petitioner.

K.S.

[F.B.]

The Chief Justice, Gentle and Somayya, JJ. *In re* a Pleader.
8th September, 1941. **R.C. No. 20 of 1941.**

Legal practitioner—Filing certificate that he had received fees without really receiving the same from client—Whether misconduct.

The filing by a legal practitioner of a certificate in Court that he had received fees from his client, while in fact he did not receive any fees, amounts to professional misconduct.

The Advocate-General in support of the motion.

V. Govindarajachari for the Pleader.

K.S.

Wadsworth, J. Chatha Nayar *v.* Janaki Amma.
8th September, 1941. **A.A.A.O. No. 205 of 1940.**

Practice—Non-appealable order—Appeal reversing—Further appeal—Competence—Power in second appeal to revise trial Court's order.

The Court has power to entertain a second appeal from an appellate decision when no appeal lay to the lower appellate Court. 45 Cal. 926; 13 All. 575 and 57 Mad. 777, relied on. The High Court can *suo motu* revise the trial Court's order and rectify it in such a second appeal.

1932 M.W.N. 1244 applied.

K. P. Ramakrishna Aiyar for Appellant.

K. Kuttikrishna Menon for Respondent.

K.S.

Wadsworth, J.
8th September, 1941.

Krishna Rao *v.* The Official Receiver, East Godavari.
C.R.P. No. 2258 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 20 *and* 21—*Provincial Insolvency Act, S.* 68—*Stay of sale at the instance of the insolvent—Sale held by public auction—*Locus standi *of the insolvent to apply for setting aside the sale.*

The equity of redemption in certain properties was advertised for sale by the Official Receiver. The insolvent filed an application on 14—9—1938 without impleading the Official Receiver for a declaration that he was an agriculturist and that his debts should be scaled down. On 27—9—1938 he applied for stay of sale under S. 20 of the Madras Act IV of 1938. The stay was refused and the sale was held on 27—9—1938. The insolvent filed an application under S. 68 of the Provincial Insolvency Act to set aside the sale. The Insolvency Court held that the application was not maintainable in law as the insolvent cannot be a person aggrieved within the meaning of S. 68. The lower appellate Court held that by virtue of Ss. 20 and 21 of the Madras Act IV of 1938 the insolvent was competent to apply and have the sale set aside.

Held, that the applications for scaling down the debt without impleading the Official Receiver and for stay under S. 20 by the insolvent were irregular and incompetent and that the insolvent had no right to seek to set aside the sale though in a proper case the Full Bench decision in 49 Mad. 461, might not bar the insolvent.

A. Lakshmayya for Petitioner.

V. Viyyanna for Respondent.

K.S.

Venkataramana Rao, J.
12th September, 1941.

Thiruvengadam Pillai and others *v.* Koolai *alias* Muthusami Pillai and others.
S.A. No. 471 of 1939.

Revenue Recovery Act (I of 1890)—*Death of registered proprietor before the date fixed for sale for recovery of arrears of revenue—Failure to serve notices of sale on the legal representatives—Effect on the validity of sale.*

It is the defaulter's interest that is brought to sale under the Revenue Recovery Act and there should be a person capable of averting the sale till the date of the sale. Accordingly where the registered ryotwari pattadar dies before the date fixed for sale for arrears of revenue the proper course for the revenue authorities would be to register the heirs of the deceased as owners in the revenue registers, serve notices on them or start the whole proceedings *de novo*. A sale without following such a course passes no title to the purchaser.

S. Parthasarathy and *V. K. Thiruvenkatachari* for Appellants.

T. V. Muthukrishna Aiyar for Respondents.

K.S.

Horwill, J.
12*th September*, 1941.

Ganapathisa and others.
Crl. App. Nos. 367 and 374 of 1941.

Madras Gaming Act (III of 1913).—*Keeping common gaming house—Gambling materials found—Presumption—Proof of absence of actual betting—Use of place after races for calculation for payment—If offence.*

The use of a place for making calculations for payment out after the results of the race would not in itself constitute an offence. The presump-

tion under the law that a certain place was kept or used as a common gaming house if gambling materials were found there, is displaced if it is proved that there was no actual betting in that place.

K. S. Jayarama Aiyar and *N. Krishnamurthy* for Accused.

The Crown Prosecutor (*P. Govinda Menon*) and *C. D. Venkataraman* for the Crown.

K.S.

[S.B.]
The Chief Justice, Wadsworth and Patanjali Sastri, JJ.
15*th September*, 1941.

Commissioner of Income-tax *v.* Maharaja of Pithapuram.
O.P. No. 31 of 1941.

Income-tax Act (1939), *S.* 16, *sub-S.* (1), *Cl.* (*c*)—*Scope and applicability.*

The income for 1938-1939 derived from the assets comprised in revocable instruments of trust and settlement executed by an assessee in favour of his delegators on April 5, 1933, before the commencement of the Income-tax Act of 1939 can be deemed to be the income of the assessee under revocable transfers of assets as contemplated by Cl. (*c*) of sub-S. (1) of S. 16 of the Income-tax Act. Such a transferor can be assessed on that income.

K. V. Sesha Aiyangar for the Commissioner of Income-tax.

Ch. Raghava Rao, V. V. Sastri and *G. C. Venkatasubba Rao* for the Assessee.

K.S.

[F.B.]
The Chief Justice, Wadsworth and Patanjali Sastri JJ.
16*th September*, 1941.

Sriramareddi *v.* Sriramareddi.
C.M.P. Nos. 4772 and 4773 of 1941.

Madras Agriculturists' Relief Act (*IV of* 1938)—*Appeal—Application for scaling down after judgment on appeal and before passing decree—Maintainability—Remitting application for scaling down to trial Court after disposal of appeal—Propriety.*

Unless an application for scaling down is filed before the pronouncement of the judgment on appeal it cannot be entertained afterwards and the drafting of the decree suspended. The proper procedure on an application for scaling down a decree filed before the appellate Court will be to call for a report from the lower Court and pass a final decree after its receipt. It is wrong to remit an application for scaling down a decree to the lower Court after the disposal of the appeal itself.

51 L.W. 606 overruled.

V. Govindarajachari and *P. Satyanarayana Raju* for Petitioner.

V. Viyyanna for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. Satyanarayana v. Veereswara Sastrulu.
25th August, 1941. App. No. 187 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 4 (d)—Personal covenant in mortgage of house property within municipality—If takes the case out of the exception in S. 4 (d).

The fact that by reason of the personal covenant contained in a mortgage of house property alone in a municipality, the debt might be enforced against the other property belonging to the judgment-debtor cannot make it a debt not contracted on the security of house property alone in a municipality. If and when a personal decree is passed, it may be open to the judgment-debtor to contend that the liability under the personal decree is not one within the exception contained in S. 4 (d) of Act IV of 1938; but this question was left open by their Lordships.

M. S. Ramachandra Rao for Appellant.

N. Vasudeva Rao for Respondents.

K.S.

Somayya, J. Secretary of State for India v. Dhupjee.
1st September, 1941. S.A. No. 508 of 1939.

Madras Land Encroachment Act (III of 1905) S. 9—Penal assessment under—Sale of land for recovery—If prevails over prior encumbrances.

S. 9 of the Madras Land Encroachment Act III of 1905 equates the penal assessment levied under it to land revenue and provides that it may be recovered as land revenue. The sale of the defaulter's property for recovery of such assessment passes the property free of all encumbrances, as S. 42 of Madras Act II of 1864 applies to the sale.

The Government Solicitor for Appellant.

G. Chandrasekhara Sastri, for Respondent.

K.S.

The Chief Justice and Chandrasekhara Ayyar, J. Venkatachalam Chetty v. Venkataraghavachari.
2nd September, 1941. O.S.A. No. 5 of 1940.

Transfer of Property Act (IV of 1882), S. 53—Scope.

A transaction may be set aside under the provisions of S. 53 of the Transfer of Property Act even where full consideration has passed, if it has been entered into with the object of defeating creditors.

V. S. Rangachari and *P. Chandra Reddi* for Appellant.

P. R. Sundaresan, A. Seshachari and *M. Sham Das* for Respondents.

K.S.

Chandrasekhara Ayyar, J. Niladri Raju v. Ramanna.
8th September, 1941. C.R.P. No. 1354 of 1941.

Court-Fees Act (VII of 1870), S. 7, Sch. IV-A (as amended by Madras Act V of 1922))—Suit for setting aside mortgage decree regarding only 2 out of various items—Proper court-fee payable.

A suit which though in form is for a declaration of the plaintiffs' interest in some specified properties is in reality one for setting aside a mortgage decree obtained against them by the defendant falls within S. 7, Sch. IV (A) of the Court-Fees Act as amended by the Madras Court-Fees Act V of 1922. Where the plaintiff's are interested only in two out of a number of properties covered by the mortgage decree for a large sum of money, which is sought to be set aside only so far as those two properties are concerned, it is suffi-

cient to pay court-fee on the market value of those two properties and it is not necessary to pay court-fees on the entire decree amount.

P. Satyanarayana Rao and *M. R. Raju* for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *P. Somasundaram* for Respondent.

K.S.

Wadsworth, J. Padmanabhudu *v.* Narasimham.
9th September, 1941. **C.R.P. No. 132 of 1941.**

Madras Agriculturists' Relief Act (IV of 1938), S. 20—Inordinate delay in deciding petition under O. 21, r. 90, C. P. Code preventing execution—If ground for refusing stay under S. 20 of Act IV of 1938.

That the execution of the decree had been prevented by considerable delay in deciding the petition preferred under O. 21, r. 90, C. P. Code is no ground for refusing a stay to which the debtor is entitled under the provisions of S. 20 of Act IV of 1938. The confirmation of sale after the Act came into force would render the application to be filed under S. 19 infructuous and therefore stay must be granted.

V. Viyanna for Petitioner.

K. Kotayya for Respondent.

K.S.

Somayya, J. Tirumalai Tirupathi Devasthanam
9th September, 1941. *v.* Tirupathi Municipal Council.
S.A. No. 53 of 1939.

Madras District Municipalities Act (V of 1920), S. 82, Cl. (2)—Cost of constructing compound walls—If can be taken into consideration in fixing the annual value of the premises for taxation.

Having regard to the purpose and intendment of the Madras District Municipalities Act and proviso to Cl. (2) of S. 82, compound walls form part of the building and the cost of constructing the compound walls should also be taken into consideration for fixing the annual value of the premises for purposes of assessment.

V. Govindarajachari for Appellant.

N. Gopala Menon and *C. S. Govindaswami* for Respondent.

K.S.

Wadsworth, J. Venkatarami Reddi Garu
9th September, 1941. *v.* Satyanarayana Reddi.
A.A.O. No. 138 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 4—Applicability.

Where an executor did not pay a legacy but used the amount for his own purposes giving the legatee a memorandum for the amount so appropriated the legatee's suit for recovery of the amount set forth in the memorandum is clearly one to enforce a liability protected under S. 4 of Act IV of 1938.

Ch. Raghava Rao and *S. Kothandarama Nayanar* for Appellant.

A. C. Sampath Aiyangar for Respondent.

K.S.

Somayya, J. Chinnappa Reddi *v.*
9th September, 1941. Venkataramanappa.
S.A. No. 803 of 1939.

Transfer of Property Act (IV of 1882), Ss. 6 (e) and 130—Right to sue for refund of purchase money for breach of covenant for title on sale of land—If actionable claim.

The first defendant sold some properties to the defendants 2 and 3 on 27—7—1929. In 1935 two persons sued the defendants 2 and 3 and obtained a decree for recovery of those properties on the ground that they belonged to them. The defendants 2 and 3 purported to sell to the plaintiff their right for refund of the purchase-money.

It was contended that the right sold was a mere right to sue for damages for breach of covenant for title and was not assignable to the plaintiff under S. 6 (*e*), T.P.Act.

Held, that what was assigned was an actionable claim and not a mere right to sue for damages. 11 Pat. 266 (P.C.), followed.

A. Lakshmayya for Appellant.

K. Krishnaswami Aiyangar and *N. Koteswara Rao* for Respondents.

K.S.

Wadsworth, J. Kallalagar Devasthanam v. Baskaram Pillai.
10th September, 1941. **C.M.S.A. No. 190 of 1939.**

Practice—Second appeal against appellate order affirming a non-appealable order—Competence.

Where an appellate Court affirms a non-appealable order a second appeal is not maintainable.

K. V. Srinivasa Aiyar for Appellant.

R. Venkataraman and *S. Viswanathan* for Respondents.

K.S.

Burn, J. Ramaswami Padayachi (Petitioner).
12th September, 1941. **C.R.P. No. 1944 of 1941.**

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 19 *and* 20—*Scope.*

The purpose of S. 20 of Madras Act IV of 1938 is to give a judgment-debtor a chance of making an application under S. 19 of the Act. Where no application for scaling down has been made even long after the filing of the application under S. 20 for stay, and the debtor prefers to go on prosecuting his application only for stay of execution, the High Court will not interfere in revision against an order dismissing the stay application.

V. T. Rangaswami Aiyangar and *K. Kalyanasundaram Aiyar* for Petitioner.

K.S.

[S.B.]
The Chief Justice, Wadsworth and Patanjali Sastri, JJ. Commissioner of Income-tax, Madras *v.* Lakshmanier.
15th September, 1941. **O.P. No. 96 of 1941.**

Income-tax Act (*XI* of 1922), *S.* 16 (3) (*a*) (*ii*)—*Applicability.*

Where a Hindu father and his sons—of whom three were minors—who were members of an undivided family were partners in two firms the provisions of S. 16 (3) (*a*) (*ii*) of the Income-tax Act applies and the minors' share of the profits can be included in the total income of the father for assessment of income-tax.

T. M. Krishnaswami Aiyar, M. Subbaroya Aiyar and *T. V. Viswanatha Aiyar* for Assessee.

K. V. Sesha Aiyangar for Income-tax Commissioner.

K.S.

[S.B.]

The Chief Justice, Wadsworth and Patanjali Sastri, JJ.
15th September, 1941.

Ramaswami Chetty *v.* Commissioner of Income-tax, Madras.
O.P. No. 96 of 1941.

Income-Tax Act (XI of 1922), *S.* 2 (6-A)—*Bonus shares in lieu of profits issued by limited company—If "dividend".*

Bonus shares issued in lieu of profits by a limited company cannot be treated as "dividend" under the Income-Tax Act as they did not amount to a release of the assets of the company. Though the company's profits have been taxed at the maximum rate the assessee is not entitled to claim a refund of the difference between the appropriate rate for him and the maximum rate.

M. Subbaroya Aiyar for Assessee.

K. V. Sesha Aiyangar for Income-Tax Commissioner.

K.S.

[S. B.]

The Chief Justice, Wadsworth and Patanjali Sastri, JJ.
15th *September,* 1941.

Annamalai Chettiar *v.* Commissioner of Income-tax, Madras.
O.P. No. 52 of 1941.

Income-Tax Act (XI of 1922)—*Foreign profits remitted to British India—Subsequent incurring of losses—If changes the character of remittance already made.*

Where profits were available for remittance and were remitted from Penang into British India, the subsequent incurring of losses after the date of remittance will not alter the character of the remittance made and such remittance made as profits is liable to assessment to Income-tax.

M. *Subbaroya Aiyar* for Assessee.

K. V. Sesha Aiyangar and *C. Rama Rao Saheb* for Income-tax Commissioner.

K.S.

Burn, J.
16*th September,* 1941.

Syed Sahib Jan Sahib *v.* Khairunnissa Begum.
C.M.A. No. 423 of 1939.

Civil Procedure Code (V of 1908), *O.* 43, *r.* 1 (s)—*Order dismissing a receiver—Not appealable.*

No appeal lies from an order dismissing a receiver under O. 43, r. 1 (*s*) of the Civil Procedure Code. I.L.R. 54 Cal. 319, not followed.

T. R. Srinivasa Aiyar for Appellant.

R. Venkataraman and *S. Viswanathan* for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
17*th September,* 1941.

Anantamma *v.* Rama Rao.
C.M.A. Nos. 532 and 533 of 1939.

Madras Agriculturists' Relief Act (IV of 1938)—*Construction of S.* 4 (h) *of the Act.*

Plaintiff, a woman obtained in 1936 a decree for Rs. 14,500 and costs amounting to Rs. 1,450. The judgment-debtor applied for scaling down the said debt, and it was admitted that the original principal was only Rs. 2,000. The plaintiff claimed protection under S. 4 (*h*) of the Act.

Held, that the plaintiff was not entitled to the protection claimed as the sum of Rs. 2,000 original principal borrowed together with the costs Rs. 1,450 awarded to her under the decree amounted to more than Rs. 3,000 and therefore the decree debt was liable to be scaled down.

V. Govindarajachari and *V. Nagaramiah* for Appellants.

Kasturi Seshagiri Rao for *D. Suryaprakasa Rao* for Respondent.

K.S.

[F.B.]

The Chief Justice, Gentle and Somayya, JJ.
17th September, 1941.

Narasimhacharyulu *v.* Secretary of State for India.
L.P.A. No. 25 of 1940.

Madras Revenue Recovery Act (II of 1864), *S.* 59—*Period of six months' for appeal—Computation.*

The period of six months provided in S. 59 of the Madras Revenue Recovery Act for an appeal must be computed from the date when the Collector finally declined to interfere in revision when alone the cause of action could be said to have arisen, and not from the date when the Deputy Collector confirmed the revenue sale. 30 Mad. 367, overruled. 23 Cal. 775 and 43 Mad. 185 (F.B.), relied on.

V. Rangachariar and *K. V. Rangachari* for appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for the Government.

P. Somasundaram and *P. Suryanarayana* for Respondents.

K.S.

Horwill, J.
17th September, 1941.

Chinnathambi and another, accused.
Cr.R.P. No. 641 of 1941.

Criminal Procedure Code (V of 1898), *Ss.* 369 *and* 421—*Appeal—Absence of appellant and his counsel when appeal taken up for hearing—Dismissal of appeal after perusal of records—Necessity to give reasons in the judgment.*

Where in an appeal by accused against their conviction neither the accused nor their counsel were present in Court when the appeal came on for hearing and the Joint Magistrate dismissed the appeal stating that he had perused the records and found that there were no grounds to interfere with the lower Court's decision,

Held, on revision, that the judgment would have been unexceptionable if the appeal had been dismissed *in limine* under S. 421 of the Cr.P.Code. As that had not been done the reasons for the conclusions arrived at in the judgment ought to have been stated in the judgment.

T. S. Venkataraman for Petitioner.

A. S. Sivakaminathan for the Public Prosecutor for the Crown.

K.S.

[F.B.]

The Chief Justice, Gentle and Somayya, JJ.
19th September, 1941.

Rangasami Aiyangar *v.* Sivaprakasam Pillai.
S.A. No. 993 of 1937.

Limitation Act (IX of 1908), *S.* 20—*Payment made by one brother after partition towards promissory note by himself and his deceased father who were members of a coparcenary—If keeps the debt as against his brothers alive.*

At a partition between three sons after the death of the father a promissory note executed by the father and his youngest son was directed to be paid by such son who accordingly made a payment of interest in June, 1933 and endorsed the same on the promissory note. In a suit brought within three years of such payment against all the three sons,

Held, that the payment by the youngest brother did not save limitation as against the other brothers as even before partition the youngest brother had no right to represent the family. 38 Mad. 968, approved.

N. R. Sesha Aiyar for Appellants.

S. Sankara Aiyar for Respondent.

K.S.

Kunhiraman, J.
19*th September*, 1941.

Venkataramayya *v.* Lingayya.
C.R.P. No. 31 of 1941.

Provincial Small Cause Courts Act (IX of 1887), S. 17—Application under—Essentials.

Where a defendant who filed an application to set aside an *ex parte* decree under S. 17 of the Provincial Small Cause Courts Act does not deposit the decretal amount but files a security bond for the amount of any decree that might ultimately be passed, without obtaining the previous directions of the Court, which is a condition precedent, the application is vitally defective and must be dismissed.

T. Rajagopalan for Petitioners.

N. V. B. Shankara Rao for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
22*nd September*, 1941.

Karuppa Goundan *v.* T.R. Narayanaswami Naidu & Co.
S.A. No. 764 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 3 and 8—Endorsee of pronote—If "creditor"—Pronote partly for cash consideration and partly for interest due under a mortgage—Scaling down.

A pronote which was made up partly of cash consideration and partly of interest due under a mortgage was sought to be scaled down as against an endorsee of the note.

Held, that the endorsee of the pronote came within the definition of the word "creditor" and that he was an assignee of the promisee. S. 120 of the Negotiable Instruments Act did not prevent the setting up of a discharge by virtue of a subsequent statute to the extent that the pronote was for interest on the mortgage. Certificate under S. 205 of the Government of India Act for leave to appeal to Federal Court granted. (1939) 1 M.L.J. 272 (F.B.), followed.

S. Ramachandra Aiyar and *M. Krishna Bharathi* for Appellant.

K. S. Sankara Aiyar and *T. B. Balagopal* for Respondent.

K.S.

The Chief Justice and Chandrasekhara Aiyar, J.
2nd September, 1941.

Lakshmana Samantho *v.* Harischandra Jagat Dev.
Appeal No. 267 of 1938.

Hindu law—Son of kshatriya male and sudra woman—Status.

The son of a kshatriya male and a sudra woman is not a sudra but a ugra, that is, he is of a caste higher than that of his mother and lower than that of his father.

I.L.R. 12 Madras 72 followed.

Accordingly the sons of such an ugra by a permanently kept concubine are not entitled to claim shares in their father's estate but are only entitled to maintenance.

T. R. Venkatarama Sastri and *B. Jagannadha Das* for Appellant.

The Advocate-General (*Sir A. Krishnaswami Aiyar*), *C. Sambasiva Rao, C. Siva Rao* and *G. Chandrasekhara Sastri* for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
5th September, 1941.

Thayyanayaki Ammal *v.* Sundarappa.
Appeal No. 436 of 1938.

Limitation Act (IX of 1908), S. 20—Part payment by mortgagor who has parted with the mortgaged property—If saves right of suit against the purchaser of the equity of redemption.

In *Pavayi* v. *Palanivela,* I.L.R. (1940) Mad. 872=(1940) 1 M.L.J. 766 (F.B.), the question was whether for purposes of S. 19, (which requires that an acknowledgment of liability in respect of any property or right must, in order to be effective, be given by "the party against whom such property or right is claimed or by some person through whom he derives title or liability") the derivation of title or liability should take place after the acknowledgment has been given, and it was held that it should. But no such question can arise on the language of S. 20 which unlike S. 19 does not require that interest or part of the principal should be paid by the party against whom the debt or legacy is claimed or by some person through whom he derives title or liability. S. 20 simply enacts that a fresh period of limitation shall be computed where interest or part of the principal has been paid by the person liable to pay or by the debtor. Payment stands on a different footing from acknowledgment as regards its effect in saving rights of action. Accordingly part payment by a mortgagor under his personal liability after he has parted with the mortgaged properties saves the right of suit against the purchaser of the equity of redemption from the bar of limitation.

K. V. Krishnaswami Aiyar for Appellant.

C. A. Seshagiri Sastri, M. Krishna Bharathi, V. Natesan, S. Swaminathan, P. R. Srinivasan, K. Srinivasan and *M. S. Venkatarama Aiyar* for Respondents.

K.S.

Wadsworth, J.
9th September, 1941.

Venkitachala Aiyar *v.* Madhavan.
C.R.P. No. 2423 of 1939.

Village Courts Act (I of 1899), S. 73—Mere illegality of order—If confers jurisdiction on District Munsif under S. 73.

Mere illegality of the village court's order does not confer jurisdiction upon the District Munsif under S. 73 of the Village Courts Act and he cannot clutch at jurisdiction by describing as unjust that which in truth he merely finds to be illegal.

N R C

N. A. Krishna Aiyar and *N. K. Anantapadmanabhan* for Petitioner.

K. V. Gopalakrishnan for Respondent.

K.S.

Lakshmana Rao, J. .. . Puthiapurayil *v.* Puthiapurayil.
9th September, 1941. **C.R.P. No. 524 of 1941.**

The Mappilla Marumakkathayam Act (XVII of 1939), S. 20 (1)—Scope.

The view that orders cannot be passed on a petition under S. 20 (1) of the Mappilla Marumakkathayam Act, until the suit for partition under Chapter III of the Act has been finally disposed of, is opposed to S. 20 (3) which requires proceeding under Chapter III to be stayed during the pendency of the petition under S. 20 (1) and hence such view is not sustainable.

B. Pocker for Petitioner.

D. A. Krishna Variar for Respondent.

K.S.

Wadsworth, J. : Ramanadham *v.* Achamma.
10th September, 1941. **C.R.P. No. 2386 of 1939.**

Madras Agriculturists' Relief Act (IV of 1938), S. 4 (f)—Liability of father arising out of breach of trust—Liability of son after father's death out of his share of family property—Not protected by S. 4 (f).

The liability of a son arising out of his pious obligation to discharge his father's debt originally arising out of a breach of trust is not protected by S. 4 (*f*) of Act IV of 1938, and accordingly, it can be scaled down.

Decision in A.S. No. 252 of 1938 followed.

V. Parthasarathi for Petitioner.

P. Somasundaram and *P. Suryanarayana* for Respondents.

K.S.

Chandrasekhara Aiyar, J. .. Rajah of Venkatagiri *v.* Nagi Reddy.
15th September, 1941. **C.R.P. No. 216 of 1940.**

Civil Procedure Code (V of 1908), O. 21, r. 43 (b)—Applicability to proceedings before Revenue Courts in execution of rent decrees.

O. 21, r. 43 (*b*) of the C. P. Code applies to proceedings before Revenue Courts in execution of rent decrees and the Court can award feeding charges in respect of cattle that were attached by a decree-holder and left in the custody of the Village Munsiff pending further orders in that application. Where such an order is made by the lower Court under S. 151 of the C. P. Code, it can be treated as one on an application under O. 21, r. 43 (*b*) and affirmed on appeal. The person who holds the livestock pending attachment proceedings holds them on behalf of the Court and not on behalf of any party to the proceedings and the person in charge will be deemed to be an officer of Court.

P. V. Rajamannar and *K. Subba Rao* for Petitioner.

K. Umamaheswaran for Respondent.

K.S.

Chandrasekhara Aiyar, J. Ananthasami Reddiar *v.*
16th September, 1941. Swamikannu Naicker.
C.R.P. No. 1977 of 1939.

Civil Procedure Code (V of 1908), O. 21, r. 92 (1)—Order holding that petitioner had locus standi, *to present the application and making consequential order that sale be set aside—Applicability of O. 43, r. 1 (j)—No revision lies.*

Where under O. 21, r. 92 (1), C. P. C., the Court holds that the petitioner had *locus standi* to present the application and makes the consequential order that the sale be set aside the order is a single one setting aside the sale and O. 43, r. 1 (*j*) confers a right of appeal. It is not permissible to divide the order into two parts and as there is a right of appeal a revision does not lie.

44 Mad. 554; 17 L.W. 680 and 38 Mad. 775 distinguished.

A. C. Sampath Aiyangar for Petitioner.

G. N. Thirumalachariar for Respondent.

K.S.

Abdur Rahman, J.
19th September, 1941.

Narayana Reddiar, Petitioner.
C.R.P. No. 424 of 1940.

Court-Fees—Rejection of insufficiently stamped plaint—Application for review with tender of deficit court-fee rejected—Right to refund of deficit court-fee tendered—Inherent power to direct certificate for refund under C.P. Code, S. 151.

After the rejection of an insufficiently stamped plaint the plaintiff put in an application for review and put in a court-fee of Rs. 183-14-0 for deficient court-fee. The court-fee stamps were cancelled as soon as they were put in. But the review application was rejected.

Held, that on the rejection of the application for review the Court should grant a certificate to the plaintiff authorising him to receive the amount which he had paid. 6 Pat. 602, distinguished.

Though Ss. 13, 14 or 15 of the Court-Fees Act have no application the court-fee can be refunded under the inherent powers of the Court under S. 151, C.P.Code.

T. E. Ramabhadrachariar for Petitioner.

The Government Pleader for Respondent.

K.S.

Venkataramana Rao, J.
19th September, 1941.

Muthukumara Maniagarar and another
v. Petha Maniagarar.
S.A. No. 167 of 1939.

Madras Estates Land Act (I of 1908), Chapter VI—Sales under for arrears of rent—Civil Procedure Code (V of 1908), S. 66—Not applicable.

Rent sales are governed by the special provisions of the Estates Land Act, Chapter VI and certificates of sale are issued under S. 124 thereof. S. 66 of the C. P. Code has no application to such sales and it does not operate as a bar to a suit for a declaration that a certain person was a benami purchaser for the decree-holder. 51 M. 76, relied on; 54 M.L.J. 462 (P.C.), distinguished.

A. Swaminatha Aiyar and *S. Thiagarajan* for Appellant.

C. S. Rajappa for Respondents.

K.S.

Burn and Happell, JJ.
19th September, 1941.

Saiyid Muhammed Sahib *v.*
Subramanyan Chettiar.
Appeal No. 65 of 1937.

Civil Procedure Code (V of 1908), S. 35 (2)—Dismissal of claim suit—Defendant making in his written statement allegations of a more exten-

sive nature than he was able to establish—If sufficient reason for disallowing defendant's costs.

The onus of making out his case always lies upon the plaintiff in a claim suit, and if he fails to make out his case his suit has to be dismissed and the fact that the defendant in his written statement has made allegations of a more extensive nature than he was able to establish is not a sufficient reason for disallowing the defendants costs.

T. K. Sundararaman for Appellant.

K. S. Venkatarama Aiyar for Respondent.

K.S.

The Chief Justice and Chandrasekhara Aiyar, J.
25th September, 1941.

Parmanandha Doss Chota Doss and Sons *v.* Nannu Lal Kanji and others.
O.S.A. No. 18 of 1940.

Transfer of Property Act (IV of 1882), S. 69—Mortgagee's power of sale without the intervention of the Court—If could be conferred by the manager of a joint Hindu family.

The mortgagee's power of sale without the intervention of the Court which is specified in S. 69 of the Transfer of Property Act is a power which is incidental to the mortgage itself. Accordingly the manager of a joint Hindu family can validly confer such a power on his mortgagee, if the mortgage effected by him is itself valid as supported by necessity.

V. V. Srinivasa Aiyangar, M.S. Venkatarama Aiyar, L. Krishna Das, K. Rajah Aiyar and *V. Seshadri* for Appellants.

K. Bhashyam, S. P. Duraiswami, S. Ramanujachari, K.P. Bhat and *M. Sundaram Aiyar* for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
30th September, 1941.

Dosapati Ramayya *v.* Pattam Anjayya.
C.R.P. No. 146 of 1941.

Limitation Act (IX of 1908), Ss. 19 and 20—Open payments endorsed on pronote—How far acknowledgement.

The Privy Council decision in 21 Lah. 470 is not an authority for or against the view that where there was a payment endorsed in such terms as to make it ineffective for the purposes of S. 20 of the Limitation Act, it might by implication amount to such an acknowledgment as would save limitation under S. 19. Where there is an endorsement to the effect "*towards the debt*" in the bond or "*towards the note*" or in such equally open language, it is legitimate to read the words of the endorsement together with the substance of the document upon which the endorsement was made and infer from the circumstances the fact that the writing of the endorsement was an acknowledgment of the subsistence of the debt.

V. Rangachari for Petitioner.

Y. G. Krishnamurthi for Respondent.

K.S.

Wadsworth, J. Seethai Janaki *v.* Lakshmi Authinatha Aiyangar.
9th September, 1941. **C.R.P. No. 2346 of 1939.**

Madras Agriculturists' Relief Act (IV of 1938), Ss. 8 and 9 (proviso)—Pronote executed in favour of mother for amount due to her sons as interest on earlier mortgage—Mother not same creditor as the creditor under the mortgage.

A promissory note was executed in favour of a mother for an amount due by defendant to her sons as interest on an earlier mortgage.

Held, that the mother cannot be said to be the same creditor as the creditor under the mortgage and the explanation to S. 8 and the proviso to S. 9 of Act IV of 1938 will have no application, and only the interest on the note can be scaled down under S. 9.

P. N. Appuswami Aiyar for Petitioner.

K. Venkateswaran for Respondent.

K.S.

Wadsworth, J. Kannan *v.* Kunhiraman.
11th September, 1941. **C.R.P. No. 2482 of 1939.**

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Preliminary decree on mortgage passed before commencement of Act IV of 1938—Liability to be scaled down.

A preliminary decree on a mortgage passed prior to the commencement of Act IV of 1938 can be scaled down under S. 19.

K. Kuttikrishna Menon and *K. Govindan* for Petitioner.

P. Govinda Menon and *K. N. Kumaran* for Respondent.

K.S.

Somayya, J. Muni Reddi *v.* Chengal Reddi.
16th September, 1941. **S.A. No. 787 of 1940.**

Madras Estates Land Act (I of 1908), S. 146—Scope.

There is nothing in the Estates Land Act or in the general law which precludes the real owner from filing a suit for a declaration that his property has not been validly sold by the landholder. The only effect of S. 146 is to render the proceedings taken against the pattadar binding on the real owner. There is nothing to prevent the real owner from showing that the sale is vitiated because the necessary steps were not taken even against the pattadar. Where the sale is held at a village different from the one in which it was proclaimed for sale the sale is vitiated.

V. Govindarajachari for Appellant.

S. A. Seshadri Aiyangar for Respondent.

K.S.

Horwill, J. Muthuveeran Chettiar and others
17th September, 1941. *v.* Mottayan Chettiar.
Cr.R.C. No. 694 of 1941 and
(Cr.R.P. No. 652 of 1941.)

Companies Act (VII of 1913), S. 4—Offence under—Magistrate's power to drop proceedings initiated by him—S. 4 (5) of Companies Act if retrospective—Power of Magistrate to take cognizance of the offence on private complaint.

Where proceedings are initiated for an offence under S. 4 (2) of the Companies Act the Magistrate can drop the proceedings if he finds that he ought not to have taken cognizance of the offence.

The members of an association cannot be punished under S. 4 (5) for having formed themselves into a company, association or partnership in

contravention of S. 4 (2) before 1936 when sub-Ss. 3, 4 and 5 were enacted. But they can be punished for continuing to be such members.

Though there may be no legal bar to a Magistrate's taking cognizance of such an offence on a private complaint it is not expedient that any "Tom, Dick or Harry" should be permitted to harass members of companies out of motives of private spite or enmity.

V. T. Rangaswami Aiyangar and *S. Amudachari* for Accused.

T. V. Ramanatha Aiyar for Complainant.

A. S. Sivakaminathan and *K. Venkataraghavachari* for the Public Prosecutor for the Crown.

K.S.

King and Happell, JJ.
18th September, 1941.

Venkatarathnam Chetti *v.* Venkatayya.
A.A.O. No. 340 of 1939.

Provincial Insolvency Act (*V of* 1920), *S.* 16—*Petition by one creditor alleging the execution of a mortgage by the debtor within three months—Petitioner not proceeding with due diligence—Another creditor allowed to continue the proceedings long after three months from date of mortgage—Date of presentation of the petition by the first creditor whether available to base adjudication of debtor an insolvent.*

A petition for adjudication of a debtor as insolvent was originally filed by one of the creditors on 25—8—1934 and it stated that the act of insolvency was the execution of a mortgage deed by the debtor on 17—8—1934. In 1937 the second petitioner, another creditor was allowed to continue the insolvency under the provisions of S. 16 of the Provincial Insolvency Act, as the Court was satisfied that the original petitioner was not proceeding with due diligence. There was no contest on the question of the nature of the mortgage executed by the insolvent and an order of adjudication accordingly followed. On appeal,

Held, that the order of adjudication was proper and that the mere accident of the fact that the creditor who has filed the petition should turn out not to have been qualified to do so will not prevent the creditor subsequently allowed to continue the proceedings under S. 16 of the Provincial Insolvency Act from taking advantage of the date of the presentation of the petition originally by the other creditor.

(1895) 1 Q.B. 194 distinguished.

I.L.R. 51 Mad. 594 relied on.

A. Bhujanga Rao and *D. R. Krishna Rao* for Appellant.

G. V. Ramalingam, R. S. Swaminathan and *S. Ranganatha Aiyar* for Respondent.

K.S.

Horwill, J.
19th September, 1941.

Ponnuswami Reddiar *v.*
Sadasiva Reddiar.
Case Referred No. 40 of 1941.
(Cr.R. Case No. 676 of 1941.)

Criminal Procedure Code (*V of* 1898), *S.* 195 (b)—*Sub-Magistrate making complaint under S.* 195 (b), *Cr.P.Code—No power to revise his order.*

A Magistrate wrote an order thus: "I therefore consider that it is essential in the interests of justice that I should take action in this case under S. 195 (*b*), Cr.P.Code and I therefore make the complaint against the respondent." Instead of making a complaint in the ordinary form he thought it more deferential to the First Class Magistrate to whom he should have preferred the complaint, to submit the records for favour of orders.

Horwill, J.
24th September, 1941.

Narayanan Nambiar Petitioner.
Cr.R.C. No. 739 of 1941.
(Cr.R.P. No. 694 of 1941).

Criminal Procedure Code Act (V of 1898), *S.* 540—*Scope—Court's discretion to examine witnesses.*

The wording of S. 540, Criminal Procedure Code is extremely wide and enables a Magistrate at any stage of any proceeding to examine any person as a witness; and where it is essential for the just decision of the case, he is bound to do so. S. 540 is not limited only for the benefit of the accused and it will not be an improper exercise of the powers of the Court to summon a witness under that section merely because the evidence supports the case of the prosecution and not that of the accused.

V. V. Srinivasa Aiyangar and *M. C. Sridharan* for Petitioner.

Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Venkataramana Rao and Somayya, JJ.
26th September, 1941.

Valangaputi Pandiyan *v.*
Rev. Father Pignol.
Appeal No. 32 of 1938.

Limitation—Sale of trust property as trustee's own property— Ab initio *void and adverse possession of alienee starts from date of alienation.*

A sale of trust property treating it as trustee's own property is *ab initio* void and possession of the alienee is adverse to the trust from the date of the alienation.

A.I.R. 1938 Mad. 60 and (1938) 1 M.L.J. 113, followed.

C. Narasimhachari and *M. E. Rajagopalachariar* for Appellant.

K. V. Krishnaswami Aiyar, T. L. Venkatarama Aiyar, P. N. Appuswami Aiyar and *S. V. Gopalakrishna Aiyar* for Respondent.

K.S.

[F.B.]
The Chief Justice, Krishnaswami Aiyangar and Happell, JJ.
3rd October, 1941.

The Cannanore Bank, Ltd.
v.
Madhavi.
Appeal No. 112 of 1938.

Civil Procedure Code (V of 1908), *O.* 21, *r.* 63—*Claim petition objecting to attachment 'not pressed and dismissed'—Subsequent suit for declaration—Limitation.*

Where a claim petition objecting to an attachment is dismissed as not pressed, the order is one against the claimant even though there has been no investigation of the claim. It is necessary for such claimant to file a suit within one year as provided under O. 21, r. 63.

M. C. Sridharan for Appellant.

K. Kuttikrishna Menon and *D. A. Krishna Wariar* for Respondent.

K.S.

Venkataramana Rao, J.
3rd October, 1941.

Saradambal *v.*
S. Subbarama Aiyar.
C.M.S.A. No. 195 of 1940.
and C.R.P. No. 1273 of 1940.

Hindu Women's Right to Property Act (XVIII of 1937)—*Widow's interest in husband's joint family property—Right of husband's creditors to proceed against.*

The widow under the Hindu Women's Rights to Property Act gets the same interest which her husband had in the joint family property and as his interest could be attached in execution for his debt in his life time, a creditor is entitled to the same remedy against the interest of the widow accrued under the Act in respect of non-agricultural land.

V. Subramaniam for Appellant.

V. C. Veeraraghavan for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
7th October, 1941.

Mantri Erram Reddi and another *v.* Karnam Soorappa.
C.R.P. No. 857 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 19—*Preliminary decree on mortgage passed before and final decree after the coming into force of Act IV of* 1938—*Subsequent scaling down—Permissibility.*

A preliminary decree on a mortgage had been passed before the coming into force of Act IV of 1938 and the final decree was passed after the Act came into force without any application for scaling down. The debtor applied subsequently for scaling down the decree under S. 19 of the Act.

Held, in revision, that in as much as the Act provided a special procedure under S. 19 for scaling down decrees passed before the Act came into force, the mere existence of a parallel remedy by way of a right to oppose the passing of the final decree without scaling down, is no bar to the special remedy under S. 19. The final decree was not a decree for the repayment of a debt within the meaning of S. 19.

M. S. Ramachandra Rao, A. Bhujanga Rao and *D.R. Krishna Rao* for Petitioner.

S. V. Venugopalachari for the Respondent.

K.S.

The Chief Justice and Happell, J.
8th October, 1941.

S. S. Pattabhirama Aiyar.
Cr. Rev. Case No. 391 of 1941.

The Madras General Sales Tax Act (Turnover and Assessment Rules) 1939—*Amendment to r.* 11 *issued in Fort St. George Gazette dated 3rd December,* 1940 *declaring amendment to have come into force from 1st April,* 1940—*How far retrospective.*

Amendment to r. 11 in the course of a prosecution for an offence under S. 15 (*a*) of the Act for non-submission of a return, when, as the rules stood on the date of the prosecution, viz., 30—8—1940, no return was due even though the turnover was over Rs. 10,000 cannot create an offence retrospectively and a conviction for the offence cannot stand.

The validity or otherwise of the amendment in other respects not questioned.

S. S. Ramachandra Aiyar for Petitioner.

The Advocate-General (*Sir Alladi Krishnaswami Aiyar*) and *A.S. Sivakaminathan* for the Government.

K.S.

Wadsworth, J. Ramanuja Aiyangar *v.*
12th September, 1941. Govindarajulu Naidu.
C.R.P. No. 1627 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (iv) and s. 15 —"Rent"—If includes amount payable by the lessee of the right to collect jodi—If deposit under S. 15 can cancel the arrears for earlier faslis.

The proprietor of an estate leased out the right to collect the jodi and the contract provided that the lessee was to pay an annual sum of Rs. 200 in return for the assignment.

Held, that this annual payment of Rs. 200 is an ordinary contractual rent paid by the lessee not as jodi, but as consideration for the leasing of the right to collect jodi from a third person. Even if the right is sold to the person or one of the persons who himself has to pay such jodi, the nature of the payment to the proprietor will not be changed. Accordingly this amount payable annually is not "rent" under Act IV of 1938 and arrears for earlier faslis cannot be cancelled by deposit under S. 15 of the Act.

S. T. Srinivasagopalachari for Petitioner.

C. S. Venkatachariar and *D. Ramaswami Ayyangar* for Respondent.

K.S.

Burn, J. Muthuvelu Udayan *v.* Thangavelu Udayan.
18th September, 1941. A.A.O. No. 556 of 1939.

Practice—Suit by ward for possession without prayer for setting aside alienations made by his de jure guardian—Maintainability.

A plaintiff suing for possession without setting aside alienations made by his *de jure* guardian, cannot be compelled to add to his plaint prayers which he does not want to add and his suit could not properly be dismissed for refusal to add those prayers. Whether the plaintiff can succeed without setting aside the alienations made by his *de jure* guardian is a totally different question. That is a question appertaining to the relief which he may or may not obtain; it does not appertain to the maintainability of the suit.

N. Suryanarayana for Appellant.

R. Rangachariar for Respondent.

K.S.

Somayya, J. Narasinga Rao *v.* Obuli Chettiar.
19th September, 1941. S.A. No. 578 of 1940.

Provincial Insolvency Act (V of 1920), S. 4—Orders under—How far conclusive.

The conclusive effect given by S. 4 (2) to orders passed by the Insolvency Court on matters which it decides under S. 4 (1) of the Provincial Insolvency Act is only between the debtor and the debtor's estate on the one hand and the claimants against him or it and all persons claiming through or under them or any of them. The expression "all persons claiming through or under them" does not include a person who claims under a transaction which had taken place prior to the commencement of those proceedings.

A.I.R. 1937 Ran. 369, not followed.

B. V. Viswanatha Aiyar for Appellant.

T. M. Krishnaswami Aiyar and *N. Sivaramakrishna Aiyar* for Respondent.

K.S.

N R C

Wadsworth and
Patanjali Sastri, JJ.
22nd September, 1941.

Ranganayakulu *v.* Gopayamma.
C.R.P. No. 1670 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 23—Scope.

In June 1934 a decree-holder attached in execution under O. 21, r. 66, C.P. Code, a mortgage debt due to the judgment-debtor. On the 9th October, 1935 while the attachment was still pending the judgment-debtor transferred her mortgage right to her daughter. In November, 1937 the mortgage right was sold by the Court in execution and was purchased by a stranger. On 7th January, 1938, full satisfaction of the decree was recorded. On 15th June, 1938, the judgment-debtor and her transferee both joined in an application under S. 23 of Act IV of 1938 to set aside the sale of the mortgage right. The judgment-debtor was a non-agriculturist and her transferee an agriculturist. Assuming without deciding that the sale of a mortgage right (though carried out under the procedure prescribed in O. 21 for the sale of debts and other movable properties) is for the purposes of S. 23 of Act IV of 1938 a sale of immovable property.

Held, (*i*) the actual judgment-debtor, not being shown to be an agriculturist she cannot apply under S. 23;

(*ii*) the transfer being in disregard of the attachment, is void as against claims enforceable under the attachment and the transferee can be ignored by the decree-holder and the execution can be proceeded with treating the transferor as still being the owner of the properties. There is therefore no property liability on the part of the transferee to entitle him to apply for scaling down. I.L.R (1939) Mad. 218 and (1940) 2 M.L.J. 887, distinguished;

(*iii*) under S. 23 an agriculturist is not entitled to get a court-sale set aside when a decree has been satisfied before the coming into force of the Act and no debt subsists on 22—3—1938. (1941) 1 M.L.J. 106 and (1940) 2 M.L.J. 417, approved.

V. Govindarajachari for Petitioner.
B. Jagannadha Das for Respondent.

K.S.

Wadsworth and
Patanjali Sastri, JJ.
25th September, 1941.

Muthyalu *v.* Chinnayya.
C.R.P. No. 2318 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Surety under S. 145, Civil Procedure Code—If entitled to apply under S. 19 for scaling down his liability—Extent of right.

A person gave a surety bond undertaking to satisfy any decree which might ultimately be passed against the judgment-debtors under an *ex parte* decree which was set aside on such undertaking. The decree itself was in respect of promissory notes in renewal of earlier ones. When the liability under the ultimate decree was sought to be enforced against the surety,

Held—Since the surety is for the purposes of execution in the position of a judgment-debtor there is no reason why he should not be given the benefit of the procedure laid down in S. 19 of Act IV of 1938 for agriculturist judgment-debtors. The liability of the surety must be taken to have arisen in 1934 when the bond and the decree came into existence and the surety is entitled to the benefits only under S. 9. The surety however is not entitled to go behind the decree and have his liability reduced with reference to the original promissory notes by the judgment-debtors.

Decision in C.R.P. No. 1965 of 1939 **explained away.**

T. R. Arunachalam for Petitioner.
K. S. Jayaram for Respondent.

K.S.

Venkataramana Rao, J.
26th September, 1941.

Thangathammal *v.* Veeranna Reddiar.
A.A.A.O. No. 157 of 1939.

Civil Procedure Code (V of 1908), S. 73—Rateable distribution—Decree-holder succeeding as heir and legal representative of judgment-debtor—How far entitled to share in rateable distribution of assets realised in execution proceedings against such representative.

A decree was obtained by *T* against her brother *R* who died subsequently leaving *T* as his heir and representative. Another creditor of *R* obtained a decree against *T* as the heir and representative of *R* and before assets were realised in execution by that creditor *T* applied for rateable distribution in respect of the amount due under the decree in her favour for which she had obtained an attachment before judgment which was subsisting on the date of the sale in execution by the other creditor and she had also applied for execution.

Held, that (*i*) if *R* had left assets other than the property which was sold, sufficient to satisfy *T's* decree her claim must be allowed. But if the only asset left was the property which was sold, so much of the property that would be necessary to satisfy her debt must be deemed to have been appropriated for her debt and only the balance will be available for payment to the respondent.

Though *T* may not be entitled to apply under S. 73 as the decree must be deemed to have been satisfied and therefore execution cannot issue, still she is entitled to urge her claim under S. 47, C.P.Code, and prevent the other creditor from appropriating the whole of the sale proceeds for satisfaction of his debt. The fact that she has chosen to claim rateable distribution should not stand in the way of her, getting the limited relief which she has claimed.

T. V. Ramanatha Aiyar and *T. S. Venkatarama Aiyar* for Appellant.

K. V. Sesha Aiyangar for Respondent.

K.S.

Horwill, J.
1st October, 1941.

Murugayya Pillai *v.* Rajagopala Pillai.
C.R.P. No. 2557 of 1939.

Stamp Act (II of 1899), S. 32—Certificate by Collector—Finality—Collectors opinion not endorsed on the document but expressed in a letter to that effect—How far binding on Civil Courts.

The petitioner after obtaining an assignment of a promissory note took the assignment to the Collector for his opinion under S. 32 of the Stamp Act. The Collector expressed his opinion that no stamp duty was necessary and sent the petitioner a letter to that effect. In a suit on the promissory note the District Munsif found that the opinion was wrong and also that the Collector had no jurisdiction to entertain the application under S. 32 because it was sent to him more than a month after the execution of the assignment. He also found that the certificate was of no avail as it was not endorsed on the instrument itself. On revision,

Held: (*i*) the Collector's decision would be final even if he erred in his opinion that no stamp was necessary;

(*ii*) but the letter is not the certificate referred to in S. 32 (2) and therefore it is not binding on the Civil Court;

(*iii*) the fact that the Collector could not rightly have given an endorsement after such a lapse of time justified the Court in not returning the document for such endorsement, especially as the petitioner persisted that the endorsement in the form of a letter was in order.

K. S. Desikan for Petitioner.

R. Sundaralingam, K. R. Subramania Aiyar and *R. Balaram* for Respondents.

K.S.

Horwill, J. Lakshmi Sundaramma and others *v.*
2nd October, 1941. Suryanarayana.
Cr.R.C. No. 732 of 1941.
(Cr.R.P. No. 687 of 1941).

Criminal Procedure Code (V of 1898), S. 488—Rate of maintenance by Criminal Court reduced pursuant to declaration in civil suit as to proper rates—Subsequent application for enhancement of rate—Forum.

The petitioner applied for and obtained in the Criminal Court an order against her husband for maintenance for herself and her three children. The husband took the matter to the Civil Court and got a declaration in 1938 that the rates awarded by the magistrate were excessive and that the proper rates would be Rs. 12 for the wife and Rs. 4 for each of her three children. The matter was taken on appeal which was dismissed in 1939. On the husband's application the magistrate then reduced the rates in 1939 in accordance with the findings of the Civil Court. Subsequently in 1940 the wife applied to the Criminal Court for enhancement of the rates on the ground that the children were then older and cost more to maintain.

Held, that (1) as the decree of the Civil Court was not executable the petitioner was entitled to go to the Criminal Court and ask for enhancement and she was not bound to go to the Civil Court.

(2) The rate of maintenance must be taken to have been fixed by the trial Court decree in the civil suit on the circumstances as they existed at the time when evidence was taken and not as on the date of the appellate Court's decree which merely affirmed that of the first Court because the rates were proper on the date of the first Court's decree.

(3) Accordingly the petitioner is entitled to an increase in the rate of maintenance of the children on the basis of increased cost of maintaining them.

D. V. Reddi Pantulu for *N. Subramanyam* for Petitioners.

K. Bhimasankaram for Respondent.

K.S.

Burn, J. Sreedevi *v.* Neelakantan Bhattadripad.
2nd October, 1941. **A.A.A.O. No. 237 of 1939.**

Civil Procedure Code (V of 1908), S. 47 and O. 21, rr. 90 and 92—Questions under S. 47 abandoned—Order if open to second appeal.

Where though several important questions under S. 47, Civil Procedure Code were raised but abandoned that will not give a right of second appeal, for the determination of a question arising only under O. 21, r. 90 of the Code.

K. P. Ramakrishna Aiyar for Appellant.

D. H. Nambudiripad for Respondent.

K.S.

Horwill, J. Venkatarama Ayyar *v.*
3rd October, 1941. Sankara Ayyar and others
Cr.R.C. 752 of 1941.

Criminal Procedure Code (V of 1898), S. 408—Fine of Rs. 33 each on each of three counts—Appealability.

The petitioner was charged under S. 500, I.P.Code on three counts of sending a defamatory letter to three persons. He was found guilty and sentenced to a fine of Rs. 33 on each of the three counts.

Held, that because the aggregate fine exceeded Rs. 50 the petitioner has his ordinary right of appeal under S. 408, though if the cases had been separately tried there would have been no right of appeal.

R. Srinivasachariar and *K. V. Rajagopalan* for Petitioner.

S. V. Rama Ayyangar for Respondents.

K.S.

Horwill, J.
3rd October, 1941.

Syed Murthusa Sahib, accused.
Cr.R.C. No. 807 of 1941.
(Cr.R.P. No. 307 of 1941).

Madras Local Boards Act (XIV of 1920), *S.* 160 (3)—*Lease of site—Notice to quit after expiry of period of lease purporting to be one under S.* 159 (1) *instead of under S.* 164 (2)—*Lessee ignoring the notice—Offence.*

The petitioner was granted a lease under S. 160 (3) of the Local Boards Act for a period of one year to use a road side site on which he constructed a small shed. He did not quit the land at the end of the period of the lease and so a notice was sent to him purporting to be one under S. 159 (1) requiring him to remove the shed within a fortnight and threatening in default proceedings under the Act. He ignored the notice and the prosecution was instituted for an offence punishable under S. 159 (1) read with S. 207 (1) (*a*) and (*c*) of the Local Boards Act.

Held, that though the notice did not purport to be a notice under S. 164 (2) but one under S. 159 (1), the notice had made very clear what was required of the petitioner and he was accordingly guilty of the offence of disregarding a lawful notice of the President.

M. S. Venkatarama Aiyar for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Horwill, J.
7th October, 1941.

Thimmakka and another *In re.*
Cr. R.C. No. 354 of 1941.

Penal Code (XLV of 1860), *S.* 186—*Sales Officer of co-operative society—Whether "public officer".*

The sales officer of a co-operative society is a public servant and the wife of a person voluntarily obstructing him from attaching the movables of the debtor in execution of a decree obtained against him by a co-operative society is liable to conviction for an offence under S. 186 of the Penal Code.

J. R. Gundappa Rao for Petitioners.

The Public Prosecutor for the Crown.

K.S.

The Chief Justice
and Happell, J.
8th October, 1941.

Sri Rajah Kavali Alimelumangathayaramma
v. Palanki Basivi Reddi.

C.R.Ps. Nos. 412 to 414 of 1939.

Madras Estates Land Act (I of 1908)—*"Water cess"—Suit for recovery—Forum.*

The plaintiff's predecessors in title sold a village to a person and undertook at the time of the sale to supply the ryots of that village water from a tank situated in another village belonging to the plaintiff. In suits filed by the plaintiff in the Civil Court for recovery of water-cess from the ryots,

Held, that the charge for water supplied was "rent" within the meaning of the Estates Land Act and the suits should have been filed only in the Revenue Courts, though the relationship of landholder and ryot did not exist between the plaintiff and the ryots in regard to the holdings.

M. Srinivasa Rao for *Kasturi Seshagiri Rao* for Petitioner.

B. V. Ramanarasu for Respondent.

K.S.

Wadsworth, J.
9th October, 1941.

Raja Shanmuga Rajeswara Sethupathi
v. Samalam Ayyar.
C.R.P. No. 283 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 15—*Mortgagee from tenant paying rent for tenant—Right of tenant to relief under S.* 15 *of the Act.*

Where the payment of rent was apparently made by the mortgagee for the tenant, the tenant is entitled to apply for the relief to which he is entitled under S. 15 of Act IV of 1938 as a result of the payment of the rent for the relevant faslis. The decision in C.R.P. No. 1730 of 1939 has no bearing for in that case the mortgagee himself applied for the relief.

K. Kuttikrishna Menon for Petitioner.

Respondent not represented.

K.S.

Venkataramana Rao, J.
10th *October,* 1941.

Bava Oushadhiswaraswami Devasthanam
v. Samiappa Mudaliar.
S.A. No. 156 of 1939.

Trusts Act (*II of* 1882), *S.* 88—*Scope.*

A trustee is not debarred from purchasing property which had originally belonged to the trust and had gone into the hands of third persons who had acquired a title to the same by adverse possession.

B. Sitarama Rao and *G. R. Jagadisan* for Appellant.

K. Bhashyam Aiyangar, R. Sundaralingam and *T. R. Srinivasan* for Respondent.

K.S.

Horwill, J.
10*th October,* 1941.

Kola Saheb, accused.
Cr. App. No. 396 of 1941.

Criminal complaint—Limitation—No bar of, to filing criminal complaint for preferring false complaint.

There is no period of limitation laid down for filing a complaint for preferring a false complaint.

A. S. Sivakaminathan for Appellant.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

The Chief Justice and Happell, J.
10*th October,* 1941.

Kailasa Ayyar *v.*
Sundaram Pattar and others.
C.R.P. No. 1271 of 1939.

Mortgage—Suit by person entitled only to a share in the mortgage-money—Valuation for court-fees and jurisdiction.

A mortgage is a single and indivisible cause of action and therefore a person seeking to enforce the mortgage for recovery of his share of the mortgage-money must ask for recovery of the full amount due under the mortgage which must therefore be taken to be the value for purposes of court-fee and jurisdiction.

Observations of *Varadachariar, J.*, in (1937) 2 M.L.J. 666, approved.

N. R. Sesha Aiyar for Petitioner.

K. Subba Rao for Respondent.

K.S.

Horwill, J.
22nd September, 1941.

Narasimhulu Chetti *v.* China Ramayya Naidu.
C.R.P. No. 2429 of 1939.

Practice—Court-fee and suit valuation—Court-Fees Act (VII of 1870), S. 12 (1)—Fixing of court-fee—Finality—If bar to subsequent finding as to value of property for purposes of jurisdiction.

A finding as to the value of the property for purposes of court-fee does not preclude the Court from afterwards coming to the conclusion that it had no jurisdiction to try the suit. The true value of the land determines jurisdiction and is also the basis for calculating court-fee, subject to the qualification of s. 12 (1) of the Court-Fees Act that when once the amount of court-fee has been determined it is final.

K. Umamaheswaram for Petitioner.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Respondent.

K.S.

Wadsworth, J.
8th October, 1941.

Kamaraju *v.* Seshagiri Rao (Receiver).
C.R.P. No. 263 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Preliminary decree in partnership suit—If can be scaled down.

There is nothing in a preliminary decree in a partnership suit which can properly be scaled down under S. 19 of Act IV of 1938, the preliminary decree not being one for the payment of a debt. If, after the commencement of Act IV of 1938, one of the parties to a partnership action, wishes to urge a defence under the Act in reduction of his liability to be declared in the final decree, the proper procedure for urging that defence is by means of a written statement filed in the final decree proceedings and not by an application to scale down the preliminary decree. If the final decree is passed after the commencement of the Act it cannot be amended under S. 19.

C. Rama Rao for Petitioner.

B. V. Ramanarasu for Respondent.

K.S.

King and Lakshmana Rao, JJ.
8th October, 1941.

Budi Geddannaidu and another *v.* Chintalapudy China Ramanna.
C.M.A. No. 70 of 1940.

Madras Debt Conciliation Act (XI of 1936), S. 25—Scope—Power of Court to demand security while granting stay under.

S. 25 of the Debt Conciliation Act has no prohibitive effect upon the power of the Court to make provision for continuing the execution proceedings in case necessity should arise in future, for instance by an order under C.P.Code, O. 21, r. 40 (2). Accordingly the Court while granting stay by releasing a debtor from arrest has the power to call upon him to furnish security.

Y. Suryanarayana for Appellant.

V. Govindarajachari for Respondent.

K.S.

N R C

Burn, J.
9th October, 1941.

Lakshmanaswami *v.* Narayanamurti.
S.A. No. 811 of 1939.

Transfer of Property Act (IV of 1882), S. 6(a)—Vendor with mere chance of obtaining legacy of certain house sites—Sale purporting to be owner—Validity of transfer.

It is not permissible to evade the prohibition of S. 6 (*a*) of the Transfer of Property Act by purporting to transfer the immovable property itself when the transferor has no title to it, but only a chance of getting it by way of legacy at some future date. Accordingly where a mortgagor merely expected to get a legacy from his sister of some house sites which he purported to mortgage as belonging to himself and the mortgagee knew that it did not belong to him, the mortgage is void as offending S. 6 (*a*) of the Transfer of Property Act.

V. Viyyanna for Appellants.

K. Venkatarama Raju and *P. Satyanarayana Rao* for Respondents.

K.S.

Burn, J.
9th October, 1941.

Muni Reddi *v.* Kondiah.
S.A. No. 833 of 1939.

Civil Procedure Code (V of 1908), S. 73—Decree against legal representative of debtor and decree against debtor in his life time—Rateable distribution.

A decree passed against the legal representative of a deceased debtor can, for purposes of S. 73, be said to be against the same judgment-debtor as a decree passed during the lifetime of the debtor against the debtor himself.

The decision in *Ramakrishna Chettiar* v. *Visvanathan Chettiar*, I.L.R. 59 Mad. 93 (F.B.), does not proceed upon any peculiar incidents attaching to a Hindu family and is in quite general terms.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

K. Kuppuswami for Respondents.

K.S.

Venkataramana Rao, J.
10th October, 1941.

Stanumurthiayya *v.* Ramappa and others.
S.A. No 784 of 1939.

Hindu law — Inheritance — Murderer disqualified from inheriting victim's estate—Issue of murderer—Rights.

One *N* the last male owner died leaving him surviving his widow and a daughter. The widow was murdered by her daughter and son-in-law. *N's* deceased divided brother's sons sued to recover the estate from the daughter's sons,

Held, that the daughter's children are entitled to inherit to their grandfather's estate in spite of the fact that their mother murdered their grandmother. Though they are related to the murderess they do not trace title through her. 48 Bom. 569 (P.C.), relied on.

K. Y. Adiga and *S. Ramayya Naick* for Appellant.

K. Srinivasa Rao for Respondent.

K.S.

Horwill, J.
13th October, 1941.

Syed Dewan Khaja Mohideen Saib
v. D. M. Abdul Guffar Saib.
C.R.P. No. 1699 of 1940.

Suit valuation—Suit for administration—Valuation for jurisdiction.

An administration suit is not a mere suit for accounts and court-fee is therefore payable under S. 17 (*b*) of Sch. II of the Act and the market value of the properties and not the notional value would be the value for the purpose of jurisdiction.

K. V. Ramaseshan and *C. D. Venkataraman* for Petitioner.

K. V. Ramachandra Aiyar for Respondent.

The Government Pleader (*K. Kuttikrishna Menon*) for the Government.

K.S.

Wadsworth and Patanjali Sastri, JJ.
14th October, 1941.

Rangaswami Pillai and others
v. Vasuammal.
C.R.P. No. 320 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 4 (h)—*Proof that woman decree-holder is entitled to other mortgage debt which will deprive her of the exemption under S.* 4 (*h*)—*Evidence that she was merely benamidar in respect of the mortgage debt—Admissibility.*

When the judgment-debtors filed an application under S. 23 of Act IV of 1938 the decree-holder being a woman pleaded that she came within the exemption of S. 4 (*h*) of the Act. As against this it was urged that she was entitled to a mortgage debt evidenced by a bond for Rs. 4,500 in her favour. She met this contention by adducing evidence that she was not the owner of the mortgage bond but a benamidar for her adopted son.

Held, that the question being purely one of ownership of the proceeds of the mortgage debt to which the ordinary law applies, there is no reason why it should not be open to the lady in question to adduce evidence that, though the mortgage stood in her name, her son was really entitled to the proceeds thereof and that she was not beneficially interested therein. 58 Mad. 693 (F.B.), referred; (1940) 2 M.L.J. 664 and (1941) 1 M.L.J. 313, distinguished.

K. G. Srinivasa Aiyar for Petitioner.

K. S. Desikan for Respondent.

K.S.

Horwill, J.
15th October, 1941.

D. K. Reddy, *In re.*
Cr.R.C. No. 741 of 1941.
(Cr.R.P. No. 696 of 1941).

Criminal Procedure Code (V of 1898), *S.* 407 (2) *and S.* 486 (2)—*Appeal under S.* 486 (1) *against sentence under S.* 480—*District Magistrate if can direct the appeal to be heard by Subordinate Magistrate.*

An appeal lies against a sentence imposed under S. 480 of the Criminal Procedure Code only under S. 486 (1) and not under S. 407. Where an appeal has thus been filed to the District Magistrate the appeal cannot as in the case of appeals under S. 407 (1) be directed to be heard by any Magistrate of the first class subordinate to him. S. 407 (2) could not be applied to an appeal under S. 486 (1).

K. S. Jayarama Aiyar and *C. K. Venkata Narasimhan* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

The Chief Justice and Happell, J.
15th October, 1941.

Ponnuswami *v.* Muthuswami Goundar and another.
C.R.P. No. 916 of 1940.

Partnership Act (IX of 1932), *S.* 69 (2)—*Registration of firm subsequent to filing of suit—If can cure the defect and make suit maintainable.*

The language of S. 69 of the Partnership Act is mandatory. If a firm which is suing was not registered at the time of the institution of the suit, the Court has no option but to dismiss it and registration subsequent to the institution of the suit is of no avail to such a plaintiff.

(1937) 2 M.L.J. 273, overruled. (1938) 2 M.L.J. 44 at 58 and I.L.R. 18 Pat. 114, followed.

S. V. Venkatasubramaniam for Petitioner.

K. S. Ramamurti and *A. N. Veeraraghavan* for Respondent.

K.S.

Horwill, J.
15th October, 1941.

Public Prosecutor *v.* Krishnaswami.
Crl. App. No. 415 of 1941.

Motor Vehicles Act (IV of 1939), *Ss.* 3 *and* 112—*Expiry of driving licence and renewal after ten days as from date of expiry—Driving without licence in the interval—Offence.*

The accused's driving licence had expired on 10th December, 1940 and on 12th December an accident occurred in which the accused while driving a motor car ran over and killed a child. He at once applied for a renewal of his licence which was granted. He was subsequently prosecuted for driving without a licence and it was contended that the subsequent renewal dated back to the 10th December and that therefore the accused must be deemed to have had an effective licence on the 12th December, 1940.

Held, that the renewal cannot be regarded as a licence to infringe at pleasure another provision of the Act or as a grant of pardon by the licensing authority to one who has broken the law. Accordingly the accused having contravened the provisions of S. 3 of Act IV of 1939 committed an offence punishable under S. 112 of the Act.

The Public Prosecutor (*V. L. Ethiraj*) in person.

K. V. Sesha Aiyangar and *N. S. Mani* for Respondent.

K.S.

The Chief Justice and Happell, J.
24th October, 1941.

Chockalinga Mudali *v.* Manicka Mudaliar *alias* Singara Mudali.
S.A. No. 1119 of 1938.

Provincial Insolvency Act (V of 1920), *S.* 44 (2)—*Mortgagee's right to personal decree under O.* 34, *r.* 6 *of C. P. Code (V of* 1908)—*Whether lost by order of absolute discharge in mortgagor's insolvency.*

A mortgagee obtained a preliminary decree on his hypotheca on January 8, 1917 and a final decree thereon on January 29, 1920. The mortgagor who was adjudicated an insolvent in November, 1917, obtained an order of absolute discharge in February, 1926. The sale of the hypotheca took place a year after the discharge and there was a deficiency for which the mortgagee applied for a personal decree under C. P. Code, O. 34, r. 6.

Held, that the personal liability of the mortgagor was not a debt provable in insolvency as the mortgagor neither relinquished nor valued nor released his security during the pendency of the insolvency proceedings. S. 44 (2) of the Provincial Insolvency Act has no application where the contingent right to the deficiency had not arisen before the order of discharge. Accordingly a personal decree for the deficiency can be passed as that liability is not extinguished by the order of discharge.

I.L.R. (1940) Nag. 512 and (1941) 2 M.L.J. 690, dissented from.

V. Rajagopalachari and *K. Rajah* for Appellant.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
6th October, 1941.

Sundaram *v.* Subba Rao.
C.R.P. No. 165 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 6—*Scope and applicability—Hindu father assessed to income-tax—Undivided sons if excluded from benefits of Act IV of* 1938.

A suit was based on a promissory note of 1933 made by the first defendant in favour of the plaintiff, defendants 2 to 5 being impleaded as the undivided sons of the first defendant. The suit debt related back to prior transactions starting in 1922. The plaintiff produced a copy of an income-tax assessment order which showed that the first defendant along with certain partners was assessed to income-tax for the financial year 1936-37 and on this ground it was held by the trial Court that neither the first defendant nor his sons could claim the benefit of Act IV of 1938. On revision,

Held, that where as in the instant case the family consists only of the father and sons, S. 6 of Act IV of 1938, has no application. The scope of S. 6 is confined to a case in which there is a major family unit which even after the application of the section still remains an agriculturist family; and in such circumstances the scope of the section would be to exclude from the benefits of the Act any member of such an agriculturist family who was a non-agriculturist and his descendants in the male line.

(1940) 2 M.L.J. 817, considered.

In the circumstances, the father is excluded from the benefits of the Act; and as regards his sons, if the assessment to income-tax was made on the father in his individual capacity only, the sons would be entitled to relief under the Act. If the assessment had been made as manager of the joint family of himself and his sons, the sons also will be excluded from the benefit of the Act.

G. Chandrasekhara Sastri for Petitioner.
S. Venugopala Rao for Respondent.

K.S.

Wadsworth and
Patanjali Sastri, JJ.
7th October, 1941.

Narayana Bhat *v.*
Rama and others.
App. No. 309 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 8 (1)—*"Interest outstanding on* 1—10—1937"—*Meaning.*

In a suit on a mortgage under which interest was payable on the 10th March of each year, it was contended that the interest from 10th March, 1937 up to the 1st October, 1937 was wiped out as "interest outstanding on 1—10—1937". The mortgagee contended that the interest was not outstanding as it was payable only on the 10th March every year.

Held, that although a date was fixed for the payment of interest, interest must be deemed to have accrued due from day to day according to the ordinary rule. The word "outstanding" used in S. 8 (1) means "unpaid" and the interest up to 1—10—1937 had certainly accrued due and was outstanding though not payable until 10th March, 1938. Accordingly the interest for the period was liable to be cancelled under S. 8 (1) of Act IV of 1938.

K. Y. Adiga and *N. Shanker Bhat* for Appellant.
T. Krishna Rao for Respondent.

K.S.

Patanjali Sastri, J.
8th October, 1941.

Duraiswami Naidu *v.* Kailasa Naidu.
S.A. No. 118 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 18 (2)—*Scope and effect.*

N. R. C.

A plaintiff was compelled to file a suit after 1st October, 1937 and before Act IV of 1938 came into force as otherwise the suit would be time-barred. But for the plea under Act IV, the suit debt would be undischarged though by reason of the Act it was found ultimately that no amount was due to the plaintiff as more than twice the amount of the principal had been paid. In the circumstances,

Held, that there was no clear reason why the plaintiff should be deprived of his costs.

T. L. Venkatarama Aiyar for Appellant.

S. A. Seshadri Aiyangar for Respondent.

K.S.

Venkataramana Rao and Abdur Rahman, JJ.
9th October, 1941.

Kunhya Bai *v.* Velayuda Pillai.
App. No. 128 of 1939.

Hindu law—Mortgage by paternal grandmother on behalf of her deceased son's minor sons, acting as their guardian—Validity of—Reversioners joining in execution—Consent—Binding nature.

The paternal grandmother of a deceased son's minor sons, executed a mortgage purporting to act as their guardian while their mother was alive. Her adult sons joined in the execution of the mortgage.

On the question of the validity of the mortgage and of its binding nature as regards the reversioners,

Held, that the mortgage was invalid so far as the minors were concerned.

I.L.R. (1940) Mad. 358 (F.B.), followed.

Held further, that the reversioners were bound by their consent which raised a presumptive proof of 'necessity' for the mortgage.

6 L.W. 530 at 534, referred to.

K. R. Rangaswami Aiyangar and *C. R. Pattabhiraman* for Appellants.

K. Venkateswaran for Respondents.

K.C.

Patanjali Sastri, J.
10th October, 1941.

Berumull Sowcar *v.* Velu Gramany.
C.C.C.A. No. 51 of 1940.

Civil Procedure Code (V of 1908), *S.* 151—*Inherent powers—Application for certified copies of decree and judgment rejected as copy stamps were not deposited within time—Restoration of the petition—If can be ordered to enable computation of time for filing appeal—Civil Rules of Practice, Rule* 129—*If applicable.*

A Court has power to treat a petition for restoration of an application for copies (of decree and judgment) dismissed for default in depositing copy stamps within the time allowed, as a continuation of the original application. 18 Mad. 374, followed. Time for filing an appeal can be computed on the basis of the applications for copies originally filed.

K. P. Ramakrishna Aiyar and *C. R. Venkatachala Aiyar* for Appellant.

A. Nagarajan and *A. Visvanathan* for Respondent.

K.S.

Happell, J.
10th October, 1941.

Somasundara Mudaliar *v.* Arunachalam.
C.R.P. No. 1231 of 1941.

Transfer of Property Act (IV of 1882), *S.* 83—*Tender of amount under mortgage—If to include expenses incurred by mortgagee in bringing the mortgaged property to sale which had to be stopped by the deposit in Court under S.* 83.

A tender must be of the whole amount due on a mortgage and that amount will include the expenses of a sale or attempted sale of the mortgaged property which had to be stopped by reason of the deposit in Court of the mortgage amount under S. 83 of the Transfer of Property Act. It is not proper to direct the mortgagee to sue separately to recover the expenses of the attempted sale by him.

P. Mrithyunjaya Aiyar for Petitioner.

Respondent not represented.

K.S.

Mockett and Kunhiraman, JJ. Prasadha Rao *v.* Sivaramayya.
14*th October*, 1941. **App. No. 110 of 1939.**

Civil Procedure Code (V of 1908), S. 35—Costs—Right of successful party—Discretion of Court to disallow, to be exercised 'judicially'.

A Court cannot be said to be exercising its discretion judicially when it makes an order depriving the successful party of his costs for capricious reasons. Accordingly, where the assignee from a mortgagee successfully defended a suit against him by the minor sons of the mortgagor alleging that the mortgage was not supported by consideration and therefore not binding on them, it is not proper to deprive the assignee mortgagee of his costs on the ground that the transfer in his favour 'appeared to be speculative'.

K. S. Jayaram for *V. Subramaniam* for Appellant.

P. Satyanarayana Rao for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. Venkataramayya *v.* Pundareekakshudu.
15*th October*, 1941. **Appeal No. 131 of 1940.**

Madras Agriculturists' Relief Act (IV of 1938), S. 21—Scope—Annulment of adjudication of debtor as insolvent long before the Act—If S. 21 applicable.

On an insolvency petition filed on 6—7—1932 a debtor was adjudicated four months later. The insolvency was not prosecuted and on 1—11—1938 the adjudication was annulled and under S. 37 of the Provincial Insolvency Act the properties were directed to vest in the Official Receiver. In 1939 the debtor filed an application for review of the order and also prayed for the scaling down of a debt due to a creditor. The creditor had filed a suit with the leave of the Insolvency Court on 21—11—1939, wherein also the debtor pleaded that he was entitled to relief under Act IV of 1938. The right to scaling down was negatived by the trial Court on the ground that the debtor had no saleable interest in agricultural land on 1—10—1937 and that by reason of the annulment of the insolvency he was not entitled to call in aid S. 21 of Act IV of 1938 and the suit was decreed. On appeal,

Held, that the estate having vested in the Official Receiver the debtor was not an agriculturist either on 1—10—1937 or on the date of the commencement of the Act. He cannot get relief under the Act unless he comes under S. 21 for which it is necessary that the debtor should be an insolvent at the time of his application. The annulment of adjudication relegates the debtor to the position which he occupied before adjudication except in so far as the vesting order places the residue of the property at the disposition of the appointee for the benefit of the creditors.

K. Kameswara Rao and *T. Rajagopalan* for Appellant.

V. Govindarajachari for Respondent.

K.S.

Somayya, J. Sundaresa Iyer *v.* Ramaswami Iyer.
20th October, 1941. **C.R.P. No. 6 of 1940.**

Provincial Insolvency Act (V of 1920), S. 50 (2)—Scope—Official Receiver declining to apply for expunging an entry in the schedule of creditors—Application by a creditor—Maintainability.

Under S. 80 of the Provincial Insolvency Act the Official Receiver framed a schedule of creditors in which he included the names of the petitioners as creditors. No appeal having been filed under S. 80 (2) of the Act against that order, the act of the Receiver should be deemed to be the act of the Court and it is as though the Court itself framed the schedule of creditors under S. 33. Where the Court prepares a schedule of creditors under S. 33 the Receiver may apply for expunging a particular debt under S. 50 (1) and where the Receiver declines to interfere in the matter when moved to do so, the Court may expunge an entry on the application of a creditor.

T. L. Venkatarama Aiyar for Petitioner.

A. Swaminatha Aiyar and *S. Thiagaraja Aiyar* for Respondent.

K.S.

Burn and Happell, JJ. Appalaswami, *In re.*
23rd October, 1941. **R.T. No. 157 of 1941.**

Criminal Procedure Code (V of 1898), Ss. 164, 533 and 537—Confession by accused—Failure of recording Magistrate to append to the statement a memorandum as required by S. 164, Cr. P. Code—Whether the error renders statement inadmissible.

A confession was recorded by a Magistrate but he did not append to the statement a memorandum as required by the provisions of S. 164 of the Criminal Procedure Code to the effect that it had been explained to the deponent that he was not bound to make a confession and that if he did so it might be used as evidence against him. The Magistrate however gave evidence that he had in fact told the accused that he was not bound to make a confession and that any confessional statement that he might make could be used against him.

Held, that the failure to append the memorandum as required by S. 164 of the Criminal Procedure Code will not necessarily invalidate a statement made by an accused person.

Ss. 533 and 537 of the Code show that the statement is not rendered inadmissible by the error.

D. Narasaraju for the Accused.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

King, J. Manickavasaga Thevar *v.* Chidambaram Pillai.
23rd October, 1941. **S.A. Nos. 643 to 649 of 1939.**

Madras Estates Land Act (I of 1908), S. 117—Provision whether obligatory or directory—Test of—Disregard of provisions as to sale—Effect of.

Where the Sales Officer whose duty it was to fix the date of the sale, settle the proclamation and cause the sale to be proclaimed, disregarded the provisions of the statute, and did not pass a single order, and the orders which the Sales Officer should have passed were passed by the Collector who had no authority,

Held, it was not a mere irregularity and the sale was a nullity.

(1940) 1 M.L.J. 20, followed.

N. S. Rangaswami Aiyangar for Appellants.

K. Venkateswaran for Respondent.

K.C.

The Chief Justice and Happell J.
24th October, 1941.

Nallamuthu Pillai *v.* Thirumalai Ayyangar.
L.P.A. No. 45 of 1940.

Easement—Customary right to irrigation from water standing on foreshore of tank—Interference by owner of servient land by putting bund to prevent submersion of his land—Right to restrain by injunction.

The patta lands in the foreshore of a tank were from time immemorial subject to submersion by the water or the tank when it was full. The owners of these lands attempted to raise bunds on their lands to prevent the submersion, causing material diminution of supply of water to the ryots of the ayacut of the tank.

Held, that the ryots of the ayacut have become entitled to have their lands irrigated with water standing on the said foreshore lands.

Any one who interferes with the customary supply is interfering with rights recognised by law and is therefore subject to the injunction of the Court.

Decision of Wadsworth, J. in S.A. No. 542 of 1937, affirmed; 36 L.W. 408, approved; 7 M.H.C.R. 37, distinguished.

K. V. Sesha Aiyangar and *J. S. Vedamanickam* for Appellants.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *K.R. Rama Aiyar* for Respondents.

The Government Pleader (*K. Kuttikrishna Menon*) for 5th Respondent.

K.S.

Patanjali Sastri, J.
24th October, 1941.

Ranganatham Chettiar *v.* Mariappa Mudali.
C.C.C.A. No. 22 of 1941.

Madras City Tenants' Protection Act (III of 1922)—Applicability to area included in the municipal limits after the Act came into force.

The expression "City of Madras," has not been defined in the City Tenants' Protection Act. S. 3 (5) of the General Clauses Act defines the term "City of Madras" to mean such local area as was so declared from time to time by the municipal authorities. Accordingly the Mambalam extensions included by a notification in 1934 in the city limits will be covered by the expression City of Madras and the City Tenants' Protection Act is applicable to that area and tenants in the area are entitled to the benefits of the Act.

N. Gopala Menon for Appellants.

S. Panchapagesa Sastri and *M. E. Rajagopalachari* for Respondents.

K.S.

King, J.
27th October, 1941.

Govindaraju Mudaliar *v.* Meenakshi Ammal and others.
S.A. No. 848 of 1939.

Trusts Act (II of 1882), S. 62—Trust for creditors—Purchaser of outstandings of creditor by trustee—Whether void or merely voidable.

One of the trustees under the deed of trust for creditors purchased the outstandings of the debtor in an auction and filed a suit as assignee to recover the dues. The suit was resisted on the ground that the purchase of the trust property by the trustee was void and conferred no title on him.

Held, that the purchase is merely voidable under S. 62 of the Trusts

Act at the instance of the beneficiaries and that subject to the terms and conditions contained in S. 62 of the Trusts Act, a creditor who has not assented to the trust deed cannot question the validity of the sale to the trustee.

K. Rajah Aiyar, K.S. Ramamurthi and *A. N. Veeraraghavan* for Appellant.

K. Bhashyam, T. E. Ramabadrachariar and *C. Natarajan* for Respondents.

K.S.

Venkataramana Rao and Abdur Rahman, JJ.
27th October, 1941.

Madura Municipal Council *v.* Madura, etc., Devasthanams.
Appeal Nos. 293 and 302 of 1939.

Madras District Municipalities Act (V. of 1920), S. 83—Shops within temple compound—How far exempt from property tax as "set apart for public worship".

Where there are shops or stalls within a temple and its adjuncts, not used only for purposes subservient to the worship in the temple, those shops are used for commercial as well as religious purposes and that makes them liable to property tax and it could not be said that the property is "set apart for public worship'' and actually used for that purpose and no other under S. 83 of the District Municipalities Act. (1940) 2 M.L.J. 897, followed; I.L.R. (1939) 1 Cal. 277, distinguished.

B. Sitarama Rao and *C. S. Rama Rao Saheb* for Appellant in Appeal No. 293 of 1939 and for Respondent in Appeal No. 302 of 1939.

K. Rajah Aiyar and *T. A. Ramaswami Reddi* for Respondent in Appeal No. 293 of 1939 and for Appellant in Appeal No. 302 of 1939.

K.S.

[F.B.]
The Chief Justice, Krishnaswami Aiyangar and Happell, JJ.
27th October, 1941.

In re Venkatarama Sarma, a Pleader.
R.C. No. 26 of 1941.

Legal Practitoner—Professional misconduct—"Temporary misappropriation"—If ceases to be an offence.

There is no such offence as temporary misappropriation known to law. If a client's money is misappropriated even for five minutes, it is nevertheless a misappropriation.

Where a legal practitioner received a cheque on behalf of his client and cashed the same his duty is to pay the money forthwith to his client and if he avoids or delays payment with false excuses he is guilty of gross professional misconduct.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) in support of the motion.

P. Satyanarayana and *Kasturi Seshagiri Rao* for the Pleader.

K.S.

The Chief Justice and Happell, J.
28th October, 1941.

Sundararao Naidu *v.* Commissioner of the Corporation of Madras.
L.P.A. No. 31 of 1941.

Writ of Certiorari—*If can be granted where other remedy is available —Elections—If can be set aside by* certiorari *proceedings.*

Where a member had been declared to be duly elected to fill up a a vacancy in the Corporation Council and had taken the oath of office, an

order cannot be passed quashing all proceedings by the Commissioner holding such election. The proper procedure, when the validity of such an election is questioned is for the aggrieved party to file an election petition and a *writ of certiorari* cannot be issued as there was other suitable remedy available.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

A. Suryanarayanaiah and *S. A. Seshadri Aiyangar* for Respondent.

K.S.

Somayya, J.
28th October, 1941.

Kalitheertha Pillai *v.* Chellathammal and others.
S.A. No. 409 of 1940.

Hindu law—Adoption—Joint family—Widow of coparcener adopting—Consent of divided sapinda *outside the family—If sufficient when surviving coparcener a lunatic incapable of giving consent.*

In an undivided Hindu family, the consent of the surviving coparceners must be obtained for validating an adoption by the widow of a predeceased coparcener as the widow has no independent or inherent power of adoption. The fact that the surviving coparcener was a minor or a lunatic unable to give his consent to an adoption, does not justify the widow in travelling outside the undivided family and making an adoption with the consent of the divided *sapindas*.

A. V. Viswanatha Sastri and *R. Sundaralingam* for Appellant.

K. R. Rangaswami Aiyangar and *S. Venkatesan* for Respondents.

K.S.

Wadsworth and Patanjali Sastri JJ.
29th October, 1941.

Somasundaram Chettiar *v.* Muthappa Chettiar.
Appeal No. 176 of 1939.

Insolvency—Practice—Decree passed against debtor before his adjudication—Official Receiver declining to prefer appeal—Right of insolvent to prefer the appeal.

A Nattukottai Chetty filed a suit against his agent for accounts and also charged him with liability in respect of certain transactions alleging misconduct on his part. The agent denied liability and contended that he was entitled to 'samans' from the principal on the profits earned during his agency. The suit was decreed and on the next day the agent was adjudged insolvent. The Official Receiver in whom his estate had vested declined to prefer an appeal against the decree.

Held, that the claim against the insolvent being a personal money claim, the insolvent himself could prefer the appeal as far as the money transaction was concerned.

Quaere: whether the insolvent could appeal as regards his claim for 'samans'.

V. Ramaswami Aiyar and *Halasyam* for Appellant.

R. Sundaralingam for Respondent.

K.S.

Horwill, J.
29th October, 1941.

The Public Prosecutor *v.* Verghese.
Crl. App. No. 569 of 1941.

Madras District Municipalities Act (V of 1920), S. 317—'Owner'—Meaning.

S. 317 of the District Municipalities Act makes only the owner liable to be punished for any construction or reconstruction of building; but the word 'owner' has a special meaning in the Act and includes a 'person for the time being receiving or entitled to receive whether on his own account or as agent the rent or profits of the property'. Accordingly the agent of an owner is liable to be proceeded against under S. 317 of the Act.

The Public Prosecutor in person.

Respondent not represented.

K.S.

Mockett and Kunhiraman, JJ.
31*st October*, 1941.

Raja Chidambaram Reddi *v.* Venugopala Reddi and 2 others.
C.R.P. No: 1354 of 1940.

Practice—Jurisdiction—Suit filed in 1932 *at Trichinopoly relating to movables and immovables situated partly in the Trichinopoly District and partly in Burma—Burma ceasing to be part of India during pendency of suit—Effect on jurisdiction of the Court as to Burma properties.*

A suit was filed in 1932 at Trichinopoly for the recovery or in the alternative partition of movable and immovable properties situated partly in the Trichinopoly District and partly in Burma. While the suit was pending the Government of India Act (1935) came into force on 1—4—1937 by which Burma was separated from and ceased to be part of India.

Held, that the Trichinopoly Court was not deprived of its jurisdiction to proceed with the trial of the pending suit as to the properties in Burma. A subsequent enactment would not deprive a Court of its jurisdiction which it had at the commencement of the suit unless such later enactment by express words or by necessary implication deprived such Courts of their jurisdiction. I.L.R. 55 Mad. 801 and 47 M.L.J. 448, applied.

K. S. Sankara Aiyar for Petitioner.

Sir Alladi Krishnaswami Aiyar and *K. G. Srinivasa Aiyar* for Respondent.

K.S.

The Chief Justice and Happell, J.
31*st October*, 1941.

Bhoovaraha Aiyangar, *In re.*
Crl. M.P. No. 1162 of 1941.

Defence of India Act (XXXV of 1939)*—Rules under r.* 130-*A, Cl.* (b) —Intra vires *the Central Government.*

R. 130-A, Cl. (*b*) is *intra vires* the Central Government. The power given to make rules with regard to arrest and trial includes power to make rules for the custody of persons pending trial. Accordingly no person accused of an offence under the Defence of India Act can be released on bail unless the Court was satisfied that there were reasonable grounds for believing that he was not guilty of such contravention of the defence of India Rules. The trial of such offences is governed by the special rules under the Defence of India Act.

K. Bhashyam Aiyangar and *J. E. Gundappa Rao* for Petitioner.

The Advocate-General and the Public Prosecutor for the Crown.

K.S.

Wadsworth and Patanjali Sastri, JJ.
13th October, 1941.

Vasudevan Nambudiri
v. Unnimaya Anteyanam.
C.R.P. No. 678 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 8 *and* 9—*Liability of coparcener joining in renewal of promissory note by manager—If entitled to have his liability scaled down as renewal of previous liability.*

It was contended that when an individual coparcener makes himself personally liable for a joint family debt, it must be deemed that there are two liabilities due from two persons one the liability due from the joint family 'person' and the other the liability due from the individual 'person' and therefore the individual coparcener becoming liable under a subsequent note cannot claim that his liability was in renewal of the earlier joint family liability.

Held, that apart from the pious obligation theory, when a junior coparcener joins in the execution of a document in renewal of a family debt for which he was previously liable only as a member of the joint family, he is entitled to have the debt scaled down as a renewal of the previous liability binding on himself. (1940) 2 M.L.J. 786 and (1941) 1 M.L.J. 39, referred.

K.P. Raman Menon for Petitioner.

P. Govinda Menon for Respondent.

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Karivaradaswami Goundeu
v. Karithruma Goundan.
Appeal No. 54 of 1939.

able under agreement—If can be varied
tances of the estate.

…h regard to maintenance without any …parties will not attempt to go behind it, there …he agreement is subject to the usual incidents of …e read and interpreted in that light. Contracts and provision of maintenance can be reconsidered and the …ed up or down as the case may be when it is shown that there … an alteration of the circumstances, that is, that circumstances … which the contract was made have varied in such a way as to make …e inequitable that the same provision should be made under the changed circumstances.

K. G. Srinivasa Aiyar for Appellants.

S. Parthasarathy, V. K. Thiruvenkatachari and *M.R. Narayanaswami* for Respondents.

K.S.

Burn and Lakshmana Rao, JJ.
14th October, 1941.

Govindaswami Naidu *v.*
Vijayammal.
A.A.O. No. 398 of 1940.

Practice—Succession certificate—Finding after summary inquiry that the petitioner was prima facie *entitled to a succession certificate—Reasons for the decision—If to be recorded.*

In holding after a summary inquiry that the petitioner was *prima facie* entitled to a succession certificate under S. 373 (3) of the Succession Act, it is not necessary for the District Judge to record the reasons for his decision.

S. Ramaswami Aiyar for Appellant.

K. V. Srinivasa Aiyar for Respondent.

K.S.

N R Ç

Wadsworth and Patanjali Sastri, JJ. Veerappa *v.* Lakshmayya.
24th October, 1941. **Appeal No. 206 of 1939.**

Limitation Act (IX of 1908), *S.* 19—*Reference in letter to "amount given to me previously"—How far sufficient acknowledgment of liability —Promise in letter to pay whatever may be due—Effect on advances barred on that date—Contract Act, S.* 25 (3).

Five sums were alleged to have been advanced in all to the debtor by the creditor. Rs. 1,000 on 14—10—1926, Rs. 2,000 on 8—1—1927, Rs. 130 on 1—3—1927, Rs. 2,500 on 11—5—1927 and Rs. 400 on 30—8—1927 making up a total of Rs. 6,030. The loans were not evidenced by any vouchers or entries in books of account. The debtor wrote to his creditor a letter on 17—7—1927 which contained the following passage: "The amount which you promised to send is Rs.1,100. The amount spent for household expenses at the time when I came to Bellary previously was Rs. 200. I spent this sum from out of the amount given to me previously. Hence please have the utmost consideration and send in all a sum of Rs. 1,300 inclusive of Rs. 200".

Held, that there was nothing in the letter to indicate that the debtor was acknowledging a subsisting liability to save limitation in respect of earlier advances.

Another letter dated 29—5—1933 said: "..........If I wait a little till there are demands for the lands they will fetch good prices. I will then sell them and discharge all your amounts".

Held, that here was a clear promise to pay whatever sums had been advanced by the creditor, which is enforceable under S. 25 (3) of the Contract Act, though some of the original advances might have become barred by limitation on that date.

K. Bhashyam Aiyangar and *D.R. Krishna Rao* for Appellant.

V. S. Narasimhachar, M.S. Ramachandra Rao and *A. Bhujanga Rao* for Respondents.

K.S.

Somayya, J. Visalakshi Ammal *v.*
27th October, 1941. Coimbatore Janopakara Nidhi, Ltd.
S.A. No. 863 of 1940.

Contract Act (IX of 1872) (*after amendment of* 1930), *S.* 178-*A*—*Jewels entrusted for safe custody—If can be the subject of a valid pledge by the depositee.*

The new S. 178-A of the Contract Act applies only to cases where the pawnor obtained possession of the goods under a contract which is bad under Ss. 19 and 19-A. But where jewels entrusted for safe custody were pawned and the pawnee took the pledge in good faith, the case is not covered by S. 178-A as the pawnor has only bare custody and nothing more and the old rule that a person cannot give his alienee a higher title than what he himself has continues to apply. Accordingly the pledge is not valid.

S. Panchapagesa Sastri and *G. Natarajan* for Appellants.

P. V. Rajamannar and *K. Subba Rao* for Respondents.

K.S.

Horwill, J. Ramachandra Rao *v.*
31st October, 1941. Chinnayya Goundan.
Cr. R. C. No. 399 of 1941.

Criminal Procedure Code (V of 1898), *S.* 197—*Health Officer beating complainant in objecting to complainant's tying a cow to a tree—Sanction of local Government for complaint—Necessity.*

A complaint was filed to the effect that the Municipal Health Officer came to him after the complainant had tied a cow to a tree, gave him a smack on the neck and told him that he had no business to tie the cow there. He said to the Health Officer that if he had been told that he should not tie the cow there, he would not have done so. The Health Officer thereupon lost his temper and gave the complainant some further blows. On a preliminary objection to the complaint,

Held, that sanction of the local Government under S. 197, Criminal Procedure Code is necessary before the complaint could be filed, though it was not part of the duty of the Health Officer to strike the complainant. S. 197, Cr.P.Code is intended to protect public servants from frivolous complaints made while they are doing their duty as public servants.

J. Krishnamurthi for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

Respondent not represented.

K.S.

Wadsworth and Patanjali Sastri, JJ.
3rd November, 1941.

Nalanunni *v.* Dakshayani Amma.
Appeal No. 266 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 14—*How far applicable to Marumakkathayam and Aliyasanthana tarwads—Personal liability of executants who were members of tarwad—Whether excluded by S.* 14.

S. 14 of Madras Act IV of 1938 applies to Marumakkathayam families also and the members of such debtor families are liable only for their portion of the debt from out of the tavazhi properties. But S. 14 does not cover the personal liability of the executant members, and as such they are liable for the full amount of the debt without any scaling down.

B. Sitarama Rao and *D. A. Krishna Warriar* for Appellants.

P. Govinda Menon for Respondents.

K.S.

Horwill, J.
3rd November, 1941.

Varadarajulu Chetty, accused.
Cr.R.Case No. 873 of 1941.
(Cr.R.P. No. 821 of 1941.)

Defence of India Act (XXXV of 1939), *S.* 34 (6)—*Scope and applicability—Act when applicable to speech relating to trade and industrial disputes—Same speech offending more than one provision of the Act—Accused whether liable to more than one conviction.*

An accused cannot be convicted three times for the same speech on the ground that the speech offended against the provisions of S. 34 (6) (*e*), (*f*) and (*g*). What is punishable is the doing of a prejudicial act within the meaning of S. 38 (1) (*a*) and the prejudicial act in the present case was the making of a speech. An objectionable remark in a speech cannot constitute several prejudicial acts merely because it is a prejudicial act in several ways. Though it would be ordinarily unfair to apply the Defence of India Act to a speech made for the purposes of promoting the welfare of the workers in a trade and industrial dispute, the Act can be applied where the speech is a wild one tending to endanger the public safety and hinder the defence of British India during a grave emergency like the war, and was likely to influence adversely the war effort of the whole body of listeners and fellow-workers of the accused.

N. D. Varadachari for *R. Chakravarthi* for Accused.

K. V. Ramaseshan for Crown Prosecutor on behalf of the Crown.

K.S.

Venkataramana Rao, J.
10th November, 1941.

Sankaralingam Pillai
v. Veluchami.
S.A. No. 1113 of 1938.

Hindu law—Adoption—Widow adopting after a bona fide *partition among surviving coparceners of her husband—Effect—Adoption valid—Adoptee's right to re-open partition and claim a share.*

A Hindu joint family consisted of four brothers two of whom died issueless leaving their respective widows. The surviving brothers effected a *bona fide* partition among themselves in 1936. Thereafter each of the two widows of the deceased brothers adopted sons to their respective husbands and one of the adopted sons brought a suit for partition claiming his one-fourth share in the family properties.

Held, (affirming the decision of the Courts below) that the adoptions were valid and that the adopted sons were in the same position as posthumous sons and therefore entitled to re-open the partition and claim their respective shares in the family properties. 12 Pat. 642 (P.C.); 59 Bom. 360 (P.C.); and 9 Mad. 64 (F.B.), relied on.

I.L.R. (1937) Bom. 508; I.L.R. (1939) Bom. 512; I.L.R. (1940) Bom. 42, dissented from.

K. Rajah Aiyar for Appellant.

B. Sitarama Rao, R. Ramasubbu Aiyar, V. Ganapati, S. K. Sundaram and *N. R. Govindachari* for Respondents.

K.S.

[F.B.]

The Chief Justice, Krishnaswami Aiyangar and Happell, JJ.
10th November, 1941.

Polovarupu Lingayya *v.* Punnayya.
S.A. No. 218 of 1939.

Hindu law—Debts—Joint family—Sale of family property by father set aside on the ground of absence of family necessity—Claim by vendee for recovery of the purchase price from the sons—Pious obligation rule—Applicability.

Where a sale of joint family property by a father had been set aside after the father's death except as to his own share, as there was no family necessity, it will be competent to the vendee to recover by a separate suit from the family property in the hands of the sons, the proportionate part of the purchase price with interest thereon by reason of the sons' pious obligation. 31 M.L.J. 502, approved; 44 Mad. 801, not approved.

There is a contingent liability on a vendor to indemnify the purchaser in case there is a failure of consideration such as when a sale is set aside at the instance of the sons on the ground that the alienation was not for a necessary purpose.

Such a contingent liability is "Rina" which the Hindu sons are bound to discharge. Meaning of "Rina" as explained in (1939) 1 M.L.J. 352, approved and affirmed. Therefore the fact that the father had died when the sale was actually set aside did not matter as there was already a "Rina" of the father.

B. V. Ramanarasu for Appellant.

K. Umamaheswaram for Respondent.

K.S.

Venkataramana Rao and Abdur Rahman, JJ.
21st October, 1941.

Narayanan Nambudiri *v.* Chathukkutti Nayar.
Appeal No. 437 of 1938 and C.M.P. No. 5946 of 1941.

Malabar Compensation for Tenants' Improvements Act (I of 1900), *S.* 6 (2)—*Decree for arrears of rent barred by limitation—If can be set off against 'improvements' decreed in favour of tenants—Such decree for rent if liable to scaling down under Madras Act IV of* 1938.

A decree for arrears of rent though barred by limitation can be set off in taking accounts under S. 6 (2) of the Malabar Compensation for Tenants' Improvements Act, against improvements decreed in favour of the tenants. In respect of such decree for arrears of rent passed before the Agriculturists' Relief Act came into force S. 15 of that Act not being retrospective can have no application as the rent wiped out after the set off, cannot be regarded as payable after Act IV of 1938 came into force.

K. Kuttikrishna Menon for Appellants.

P. Govinda Menon for Respondents.

K.S.

Horwill, J.
24th October, 1941.

Veeraswami—Accused.
Crl.R.C. No. 822 of 1941.
(Case Referred No. 48 of 1941).

Penal Code (XLV of 1860), *Ss.* 380 *and* 420—*Property taken away from servant of owner by cheating—Conviction for 'theft in a building', by Sub-Magistrate with no power to try an offence under S.* 420—*Propriety.*

Accused went to the house of the complainant and represented to a servant who was in the house that his master had sent him to take certain vessels. The servant thereupon handed over the vessels to the accused, who went away with them.

Held, that though the offence of cheating was committed by the false representation to the servant, that does not mean that there was no offence of theft in a building. Though a Sub-Magistrate could not have tried a case punishable under S. 420, I.P.Code, if in fact the Sub-Magistrate did not realise that an offence had also been committed under S. 420, I.P.Code, a conviction under S. 380 by such a Magistrate is proper and not without jurisdiction.

Accused not represented.

The Public Prosecutor (*V.L. Ethiraj*) for the Crown.

K.S.

King, J.
24th October, 1941.

Raja of Ramnad *v.* Ataichi Thevar.
S.A. Nos. 266 of 1938, etc.

Madras Estates Land Act (I of 1908), *S.* 12—*Levy of tax on trees—Right of the land-holder.*

The Ramnad Estate sought to recover rent from a number of ryots of the estate in respect of the use and enjoyment of trees grown in their holdings after Act I of 1908 came into force. The lower Courts found that the lands in the ryots' holdings were patta lands for which *tirwa* was payable unless cultivation was not possible for no fault of the ryots. They negatived rights in the estate to get tax for the trees under the circumstances.

Held, that the object of S. 12 of the Estates Land Act was to negative any rights of the Zamindar in the trees grown after the Act came

into force and the levy of any tax for such trees on any ground will be in violation of that object and in derogation of the absolute rights in the trees contemplated by S. 12.

K. Kuttikrishna Menon for Appellant.

K. Bhashyam Aiyangar, T. R. Srinivasan and *K. Raja Aiyar* for Respondents.

K.S.

Abdur Rahman, J.
31st October, 1941.

Sethuramasubramania Pillai *v.* Abraham.
C.R.P. Nos. 499, etc., of 1940.

Madras Estates Land Act (I of 1908)—Tenants evicted—Suit for recovery of possession by them asserting that they were permanent tenants—Maintainability in Civil Courts—Application for leave to sue in forma pauperis—*Maintainabilty.*

Where evicted tenants apply for leave to sue *in forma pauperis* in Civil Courts alleging their being permanent tenants as a ground of their title, for the suits which they intend to file for the recovery of possession of the lands from which they have been according to them unjustly evicted by their landlord, it would be for the Civil Court to decide whether they have the title which they assert for recovering possession, and their application for leave to sue *in forma pauperis* cannot be rejected.

S. P. Vasudevan for Petitioner.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Respondent.

K.S.

Kunhi Raman, J.
31st October, 1941.

Venkatappa *v.* Narasappa.
C.R.P. Nos. 1439 to 1441 of 1940.

Madras Estates Land Act, (I of 1908), S. 163 (a) *(as amended)—Applicability—Suit to evict trespassers—Maintainability in Civil Court.*

The plaintiff was the assignee of a half share in a shrotriem village. The entire village belonged to the plaintiff's uncle *P* who married *K* and had a son *S* by her. Subsequent to the birth of *S*, *P* sued for a partition of the village into two equal shares and for separate possession against his son, a minor represented by his mother *K* and a decree was obtained in which the suit properties were allotted to the share of *P* who assigned the decree to the plaintiff out of natural love and affection and also executed a deed of gift in plaintiff's favour conveying his half share in the shrotriem. *K* disputed the transfer to the plaintiff and professed to give a lease of the entire shrotriem village to *X* who induced others to cultivate the lands in the village. Plaintiff sued the lessees alleging that they were trespassers liable to be evicted from the suit lands.

Held, that had the defendants been admitted as tenants by the plaintiff or had they been recognised as such by her, the Civil Court would not have jurisdiction to entertain the suit in ejectment which would in that case have to be filed in a revenue Court. Since the defendants were admitted by *K* who had no title to the whole village the defendants were in respect of the plaintiff's share trespassers and S. 163-A of the Estates Land Act applied to the case and the plaintiff was entitled to file the suit in a Civil Court. I.L.R. 38 Mad. 1155; 27 M.L.J. 490 and A.I.R. 1940 Mad. 451, distinguished.

R. Ramalinga Reddi for Petitioner.

V. S. Narasimhachar for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
3rd *November*, 1941.

Ramaswami Naicker *v.* Gopala Naicker.
App. No. 235 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 8—*Debt due jointly and severally from A and B included in fresh document executed by A alone —If in renewal of earlier one—Question of consideration which passed between the joint debtors—If material.*

Where there is a debt due from *A* and *B* jointly and severally which is included in a fresh document executed by *A* alone, *A* can claim that the second debt is a renewal of the first. It is no concern of the Courts in scaling down such debt to go into the question of what consideration passed between the two joint debtors in order to induce one of them to undertake the liability alone. It is not possible to look into the motives or the consideration for the disappearance of the co-debtor. The fact that *B* can be shown to have got rid of his liability under the first note by a transfer of another mortgage to *A* and that showed that each of the debtors held himself liable only for half the amount under the first note cannot induce the Court in scaling down to hold that the second note was not a renewal to the full extent of the earlier liability.

R. Desikan for Appellant.

N. Somasundaram for Respondent.

K.S.

Somayya, J.
4*th November*, 1941.

Raja Sir Annamalai Chettiar *v.* Desai Krishnama Chetty.
S.A. No. 298 and A.A.O. No. 232 of 1940.

Transfer of Property Act (IV of 1882), *Ss.* 109 *and* 111 (*g*)—*Scope—Notice of forfeiture of lease given by lessor after transfer of his property available to transferee from lessor.*

The wording of S. 109 of the Transfer of Property Act is different from S. 10 of the English Conveyancing Act, 1881, and hence the decisions construing the latter as not conferring upon the transferee from the lessor a right to give notice in cases of breaches before the transfer are not applicable to cases arising under the Transfer of Property Act. Cases in India are governed by the express language of S. 109. Accordingly a notice given by a lessor after transfer asking the lessee to surrender the property is invalid and ineffective as a notice of forfeiture under S. 111 (*g*) of the Transfer of Property Act.

V. Ramaswami Aiyar for Appellant.

V. T. Rangaswami Aiyangar and *K. S. Sankararaman* for Respondent.

K.S.

Abdur Rahman, J.
7*th November*, 1941.

Subbaraya Pillai *v.* Rajammal and others.
S.A. No. 564 of 1939.

Hindu law—Limited owner—Gift of properties—Reversioner attesting —Attestation whether imported knowledge.

Two limited owners divided the last male owner's properties excluding rights of survivorship. One of the limited owners made a gift of the properties she got under the partition and the reversioner attested the deed. After the death of the limited owner who gifted the properties (the other having died before), the reversioner filed a suit to get possession of the properties alleging the invalidity of the gift beyond the donor's lifetime. The suit was dismissed by the lower Courts applying 52 Mad. 556 (F.B.).

Held, that mere attestation cannot import knowledge of the contents of the document; positive proof of knowledge was essential to invoke the "stringent equity'' of estoppel.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

T. E. Ramabhadrachariar for Respondent.

K.C.

The Chief Justice and Burn, J.
13*th November*, 1941.

T.N. & Q. Bank, Ltd., by Official Liquidators *v.* N.S.V. Subbayya Nadar.
Appeal No. 276 of 1939.

Contract Act (IX of 1872), S. 139—Surety for particular accommodation account with bank—Bank giving accommodation to creditor on another independent account on security of immovable property of creditor, without knowledge or consent of surety—Effect on liability of surety.

A bank gave accommodation to a firm and a surety guaranteed the account. Without the knowledge and consent of the surety the bank subsequently gave the firm an accommodation in a separate account on the security of the immovable properties belonging to the members of the firm. But the accounts continued to be operated for sometime. Then the bank sued the principal debtors and the surety.

Held, that the opening of the second and independent account was not inconsistent with the rights of the surety and did not discharge the surety. 1 T.L.R. 63 and 20 C.W.N. 562, relied on.

Dr. V. K. John, R. Rajeswara Rao and *D. Noronha* for Appellants.

B. Sitarama Rao and *A.V. Narayanaswami Aiyar* for Respondent.

K.S.

Burn, J.
14*th November*, 1941.

Khizar Muhammad *v.* Abdul Razack Sahib.
C.M.P. No. 655 of 1941.

Practice—Civil Revision Petition—Dismissal for default—If can be restored.

There is no power under the Code of Civil Procedure to restore to file a Civil Revision Petition dismissed for default. S. 107 and O. 9, r. 9 of the Civil Procedure Code, have no application. There seems to be no inherent power either to restore such petition. A power to dismiss such a petition does not necessarily imply a power to restore the same.

S. A. Ahmed Meeran and *C. A. Mohammad Ibrahim* for Petitioner.

S. T. Srinivasagopalachari for Respondent.

K.S.

Venkataramana Rao and Abdur Rahman, JJ.
29*th October*, 1941.

Rayalamma *v.* Butchiramayya.
App. No. 174 of 1938.

Interest Act (XXXII of 1839), *S.* 1—*Scope—Owelty payable under partition—Nature of—Interest on—If can be awarded.*

Per Venkataramana Rao, J.—Where a sum of money is to be paid by a person who takes the A schedule property under a partition to the person who takes the B schedule properties by way of equality of partition or what is termed as "owelty", that amount is always regarded in a Court of equity as in the nature of a sum due to the vendor of land from his vendee. One co-sharer parts with a portion of the property as representing the share he is legitimately entitled to in consideration of a sum of money in respect whereof he must be regarded as the vendor and the person who takes the property must be regarded as the vendee. Interest can therefore be awarded on such amount.

Per Abdur Rahman, J.—Though the jural relationship of the parties to a partition was not one of those stated in Hals. Vol. XXI, pp. 40 and 41, yet having regard to the fact that the defendants had been realising the income of the plaintiff's share in the joint family property under the deed of partition without discharging the debt they were liable to pay thereunder, it may not be incorrect to award interest under the proviso to S. 1 of the Interest Act even if the analogy of a vendor and purchaser may not be strictly applicable to the case.

43 Bom. 181, relied on.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *Ch. Raghava Rao* for Appellants.

V. Govindarajachari and *M. S. Ramachandra Rao* for Respondents.

K.S.

Somayya, J.
5*th November*, 1941.

Ramachandramurthi *v.* Lachamma.
A.A.A.O. No. 244 of 1939.

Limitation Act (IX of 1908), *Art.* 182 (5)—*Applicability—Application for restitution—Final order on last application—If saves limitation.*

An application for restitution is an application for execution so as to attract the rule that a final order on a previous application gives a fresh starting point. The mere fact that a relief was asked which ultimately was held not grantable under that order or decree does not make the previous application not one in accordance with law.

K. Kameswara Rao for Appellant.

K. Bhimasankaran for Respondent.

K.S.

Wadsworth. J.
7*th November*, 1941.

Mallayya *v.* Mallayya.
C.R.P. No. 253 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 8 and 9—*Pronote in favour of* A *the brother of* B *in* 1931 *when they were undivided—Fresh note of* 1933 *in favour of* B *in discharge of the earlier one—Partition between* A *and* B *in* 1932—*Note assigned in* 1937 *to* A *who sued on it—If suit can be dismissed on failure of* A *to produce the earlier note—Scaling down—Principles.*

The plaintiff sued on a note executed by the second defendant in favour of the plaintiff's brother the first defendant on 14—4—1933, which was assigned to the plaintiff on 2—8—1937. It was found that the second defendant was an agriculturist. It was in evidence that the suit note of 1933 actually discharged an earlier note of about the year 1931 executed in favour

of the plaintiff himself at a time when the family was undivided, the partition being in 1932. The lower appellate Court found that the creditor had not fulfilled his duty of putting before the Court the materials necessary for scaling down the debt because of the non-production of the prior document of 1931 and that in the absence of proof of the documents necessary in order to ascertain the original principal no decree could be given against the second defendant. On revision,

Held:—No doubt, in a case in which it can be shown that the creditor has wilfully failed to produce earlier documents which ought to be looked into for the purpose of scaling down the debt the Court would be entitled to draw an inference adverse to the creditor from the non-production of those documents. [Error in report of C.R.P. No. 331 of 1939 in (1940) 2 M.L.J., N.R.C. 27 pointed out.] But as the suit note itself was executed in favour of the first defendant in discharge of an earlier note executed in favour of the first defendant in discharge of an earlier note executed in favour of the plaintiff, the fact that the suit note was subsequently assigned to the plaintiff would not make the note a renewal of an earlier debt in favour of the same creditor. As the first note was executed in favour of the plaintiff as representing the joint family and the second one was executed in favour of the first defendant as a member of that family to whom the debt had been assigned on partition it could not be said that the creditors were the same in the two transactions. If the note of 1931 had been assigned to plaintiff before it was discharged by the note of 1933 there would be a renewal in favour of the same creditor but no such case was pleaded. Accordingly the suit ought not to be dismissed solely for the reason that the plaintiff had not produced the materials necessary to scale down the debt but must be decreed as scaled down under S. 9 of the Act.

P. Chandra Reddy for Petitioner.

E. Venkataramana Rao for Respondent.

K.S.

Horwill, J.
13*th November*, 1941.

Appasami Mudaliar, accused.
Crl.R.C. No. 757 of 1941.
(Crl.R.P. No. 711 of 1941).

Madras General Sales Tax Act (IX of 1939), *Ss.* 11 *and* 15 (*b*)—*Person called upon to pay a tax of Rs.* 30 *on or before a certain date—Failure to pay—Prosecution during pendency of appeal against imposition of the tax—Propriety.*

S. 11 of the Sales Tax Act indicates that where a person is taxed to a lump sum, he need only pay during the pendency of an appeal against the taxation what he admits to be due but if he is ordered to pay a tax by instalments he has to pay the accrued instalments whether he admits them to be due or not. In any event the person should not be prosecuted while his appeal against the order taxing him was still pending, for non-payment of the tax which in fact was ultimately found not to be due.

V. V. S. Sastri for *Ch. Raghava Rao* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Wadsworth, J.
14*th November*, 1941.

Appukutti Nambiar *v.*
Cheruvath Nambiar.
C.R.P. No. 360 of 1940.

Madras Agriculturists' Releif Act (IV of 1938), *S.* 15 (4)—*Deposit in respect of one out of twelve items in a holding—Satisfaction of claim for arrears of rent in respect of such item—If can be recorded—Malabar Tenancy Act (XIV of* 1930), *S.* 3.

A holding is a parcel or parcels of land held under a single arrangement by a tenant from a landlord. So where twelve items were held under

a single engagement they would form a single holding forming security for a single kanom amount to be redeemed as a single tenure which neither party can split up at will. Therefore a deposit of rent under S. 15 (4) of Madras Act IV of 1938 cannot be made in respect of one item only and relief obtained in respect thereof.

K.P. Ramakrishna Aiyar and *S. Krishnamurthi* for Petitioner.

P. Govinda Menon for Respondent.

K.S.

Horwill, J.
14th November, 1941.

Mariasoosai *v.* Arokkiam.
Cr.R.C. No. 810 of 1941.
(Cr.R.P. No. 761 of 1941).

Criminal Procedure Code (*V of* 1898), *S.* 422—*Appeal against conviction allowed—Notice to complainant who was awarded compensation not given—Effect.*

Where in an appeal against conviction the matter has been fairly heard after notice to the Crown and after hearing the Public Prosecutor, and where a proper judgment has been written, it would be grossly unfair to require an accused who had been acquitted to go through a fresh ordeal because the appellate Judge had heard only the Public Prosecutor (which is all that is required under S. 422 of the Code of Criminal Procedure) and not the complainant's vakil also. There is neither any irregularity nor illegality in not giving notice to the complainant merely because he was awarded compensation under S. 545 of the Cr.P.Code.

J. S. Vedamanickam for Petitioner.

T. S. Vaidyanatha Aiyar for Respondents.

The Public Prosecutor (*V.L. Ethiraj*) on behalf of the Crown.

K.S.

Horwill, J.
14th November, 1941.

Public Prosecutor *v.* Papanna.
Crl. Appeal No. 644 of 1941.

Factories Act (*XXV of* 1934), *S.* 60—*Owners and occupiers of factory—If can escape liability for contravening Act by leaving the affairs of the factory in the hands of a manager.*

The owners and occupiers of a factory cannot relieve themselves of their responsibilities regarding compliance with the requirements of the Factories Act by appointing a manager; they must see that the manager carries out his duties. It is only when the manager has acted in express disobedience of their order and they have done their best to see that the provisions of the Act are complied with, that they can themselves escape liability. S. 60 makes it clear that both the manager and occupier are liable.

A manager is not a "managing agent" referred to in the proviso to the definition of "occupier" and therefore the manager cannot be deemed to be the occupier of the factory. The ignorance of the occupiers however may be a ground for awarding a smaller punishment but not for acquitting them.

Appellant in person.

V. V. Chowdhry for Respondent.

K.S.

Wadsworth, J.
14*th November*, 1941.

Bhushigadu *v.*
Veeramma.

C.R.P. Nos. 2511 to 2521 of 1939, etc.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 15—*Order of a Deputy Collector under—If open to revision by District Collector under S.* 205, *Madras Estates Land Act.*

The District Collector has no jurisdiction under S. 205 of the Madras Estates Land Act to revise an order of the Deputy Collector passed under S. 15 of the Madras Agriculturists' Relief Act. The powers of revision under S. 205 of the Madras Estates Land Act clearly relate to proceedings under Estates Land Act and not to proceedings under other Acts.

Y. G. Krishnamurthi for Petitioner.

Respondent not represented.

K.S.

Kuppuswami Ayyar, J.
14*th November*, 1941.

Hanumantha Reddy *v.*
Golla Bodanna.

C.R.P. No. 2351 of 1940.

Practice—Decree on promissory note for payment of amount in eight annual instalments—No default clause—Propriety—Interference in revision.

Where a decree on a promissory note directed the payment to be made in eight annual instalments without making any provision regarding default of payment on due dates,

Held, that such direction was improper in that it denied virtually the plaintiff's rights. The decree was accordingly modified by directing the amount to be paid in quarterly instalments and that if there was any default in payment of any one of the instalments the whole amount shall become due.

54 All. 539, relied on.

S. Narasimha Aiyangar for Petitioner.

Respondent not represented.

K.S.

Horwill, J.
17*th November*, 1941.

Krishnappa Chettiar and another
Appellants.

Appeal No. 447 of 1941.

Court-fees—Partition suit—Coparcener claiming that he had lent an amount to the manager and that it should be taken into account in the partition—Finding that there was no such debt—Appeal—To bear ad valorem *court-fee.*

In a partition suit the defendant a brother, claimed that he lent a certain sum of money to his father who was then the manager of the family and that that sum of money should be taken into account in partitioning the property. It was held by the trial Court that no such debt was due by the family to the defendant. In an appeal against that finding,

Held, that the claim in appeal cannot be said to be incapable of valuation and therefore the appellant will have to pay court-fee *ad valorem.*

A.C. Sampath Aiyangar for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S.

Kuppuswami Ayyar, J.
14th November, 1941.

Rangaswamy Aiyangar *v.* Conjeevaram Co-operative Central Bank, Ltd.
C.R.P. No. 1134 of 1940.

Madras Co-operative Societies Act (VI of 1932), *S.* 51—*Scope—Dispute relating to provident fund amount due to a dismissed servant—Whether cognizable by Civil Court or should be decided only by Registrar or arbitrator.*

The provident fund amount due to a servant of a Co-operative Society represents the amount payable to him in respect of deductions from his monthly salary made under the rules, on the understanding that the same with some additional sum by way of interest would be repaid to him at the end of his service or dismissal. The claim by a dismissed servant constitutes a dispute touching the business of a registered society in its wider sense. Such a claim would come also under the narrower sense of the term "business", for it relates to the banking business.

Such a claim falls within the purview of S. 51 of the Madras Co-operative Societies Act and is not cognizable by a Civil Court. The proper tribunal is the one under S. 51 of the Act. The substitution by Madras Act VI of 1932 in S. 51 of the expression "shall" instead of the corresponding provision "may", in the rules framed under S. 43 of Central Act II of 1912, indicates that the object of the Legislature was to constitute a single special tribunal for the purpose of deciding such disputes.

Sundararajan and *Sivaswami* for Petitioner.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Respondents.

K.S.

Wadsworth, J.
14th November, 1941.

Kuppana Goundan *v.* Vellayappa Goundan.
C.R.P. No. 812 of 1940.

Madras Agriculturists' Relief Act (IV of 1938)—*Pro-note representing interest due on a mortgage of* 1928—*Assignment to plaintiff in* 1939—*Liability under note affected by Act IV of* 1938.

A promissory note representing interest due on mortgages of 1928 was assigned in January, 1939 to the plaintiff who took the note without knowing that it represented interest due on earlier mortgages. In a suit to enforce the promissory note,

Held: The want of knowledge of the plaintiff as to the nature of the consideration will not prevent the Madras Agriculturists' Relief Act from operating upon the debt. There is no protection for a holder in due course against a statutory reduction of liabilities.

K. S. Ramamurthi for Petitioner.

T. V. Muthukrishna Aiyar for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
17th November, 1941.

Venkatakrishnayya *v.* Malakondayya.
C.R.P. No. 156 of 1939.

Provincial Insolvency Act (V of 1920), *S.* 6 (*e*)—*Order of adjudication based on a sale in execution as act of insolvency—Sale subsequently set aside—Adjudication order—If to be cancelled.*

Under S. 6 (*e*) of the Provincial Insolvency Act a debtor commits an act of bankruptcy if any of his property has been sold in execution of the decree of any Court for payment of money. The question whether the sale is eventually set aside for some irregularity or whether the debtor eventually finds it to his interest to deposit the amount of the particular decree is not really material and does not alter the fact that the property was sold in

execution of a decree. Accordingly the setting aside of the sale is not a sufficient reason for cancelling the order of adjudication.

A. Bhujanga Rao and *M. S. Ramachandra Rao* for Petitioner.

K. Kotayya and *T. Rajagopalan* for Respondents.

K.S.

Horwill, J.
19th November, 1941.

Bapiraju *v.* Veerraju.
Crl.R.C. No. 341 of 1941.
(Crl.R.P. No. 324 of 1941).

Criminal Procedure Code (V of 1898), *S.* 488—*Petition by wife for maintenance—Dismissal by consent on parties composing their differences—Subsequent ill-treatment by husband—Wife if precluded from making fresh application under S.* 488.

After a wife filed a maintenance petition against her husband, the parties composed their differences and the wife agreed to go back and live with her husband and he agreed to keep her. The maintenance petition was therefore dismissed by consent. The wife went and lived with her husband. Subsequently being ill-treated by her husband she was compelled to leave him. She therefore filed another petition under S. 488, Criminal Procedure Code for maintenance for herself and her son.

Held, that the wife was not precluded from going to the Criminal Court again on a fresh cause of action, namely, the subsequent ill-treatment.

V. Parthasarathi for Petitioner.

Respondent not represented.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Horwill, J.
24th November, 1941.

Veerappan Chetty, *In re.*
Crl.R.C. No. 713 of 1941.
(Crl.R.P. No. 669 of 1941.)

Madras Port Trust By-laws—By-law 2, *Cl.* (3)—*Person with dealer's token loitering in harbour otherwise than on business for which he had token—If trespasser.*

The accused having a dealer's token (which entitled him to enter the premises of the harbour for the purpose of transacting his business, which is that of a merchant who sends goods abroad and receives goods by ships coming from other parts) was found loitering in the harbour without any *bona fide* business but to see a friend off. He was convicted under by-law 2, Cl. (3) of the Madras Port Trust By-laws for loitering and sentenced to a fine of Rs. 10. On revision,

Held, that having regard to the special definition of "trespass" in that by-law only a person not in possession of a token found on the harbour premises can be punished. Where a person misused a token the only remedy of the authorities is to cancel the token.

M. K. Harihara Aiyar for Accused.

C. D. Venkataraman for the Crown Prosecutor for the Crown.

K.S.

Patanjali Sastri, J.
14th November, 1941.

Subbayya *v.* Venkatayya.
S.A. No. 728 of 1939.

Injunction—Person found to be in possession and enjoyment of properties for long time—Alleged attempt to oust him from possession by persons claiming title—If can be restrained by injunction without deciding question of title.

Where it is found that plaintiffs had been in possession for a long time, the plaintiffs' possession and enjoyment are entitled to protection at the hands of the Court even against those who may be entitled to the property. The question of title need not be gone into or determined in such proceedings. Even if the plaintiffs are ousted from possession, they would be entitled to get back their possession by a suit under S. 9 of the Specific Relief Act.

K. S. Jayaram for Appellants.

Kasturi Seshagiri Rao for Respondent.

K.S.

Somayya, J.
18th November, 1941.

Vaidyanatha Bhattar *v.* Madavarvilagam Sri Vaidyanathaswami Koil Devasthanam.
S.A. No. 1013 of 1939.

Limitation Act (IX of 1908), *Arts.* 102 *and* 120—*Applicability—Suit for honours and perquisites by person holding office of Archaka, Sthanika, Karuvelan and Periathanam in temple—Limitation.*

A suit claiming certain temple honours (though there may be some perquisites attached to them) cannot be said to be a claim for 'wages' falling under Art. 102 of the Limitation Act. Such a suit is governed by Art. 120. The term 'wages' cannot be applied to a case where certain honors and perquisites are claimed not as remuneration for work done and not periodically but only on special occasions of auspicious and inauspicious ceremonies.

V. Ramaswamy Aiyar for Appellant.

S. Panchapagesa Sastri and *T. R. Sangameswaran* for Respondent.

K.S.

Burn, J.
19th November, 1941.

Hanumantha Rao *v.* Ramayya.
S.A. Nos. 116 and 203 of 1939.

Tort—Libel—Privilege—Defendant in suit for damages for wrongful dismissal filing extracts from reports by him to show the grounds for dismissal—Extract defamatory of plaintiff—Absolutely privileged.

The defendant, a Headmaster, having been sued for damages for wrongful dismissal thought it necessary for the purpose of his defence to show the grounds upon which the plaintiff, a teacher, was dismissed by the managing committee. The defendant filed extracts from a report made by him to the school committee and such extracts were found to be defamatory of the plaintiff. In an action for damages for alleged libel,

Held, that the occasion was one of absolute privilege as the statement was made in Court in the course of and for the purpose of defence. Whether or not writs, pleadings and affidavits are governed by the law of absolute privilege depends entirely on the nature of the statements in writing that are filed and the purpose for which they are filed. If they are documents considered by a party as being essential for his defence they are covered by the doctrine of privilege.

(1938) 2 M.L.J. 340, distinguished.

Ch. Raghava Rao and *V. Govindarajachari* for Appellants.

P. Satyanarayana Rao for Respondents.

K.S.

Venkataramana Rao and Abdur Rahman, JJ.
20th November, 1941.

Narasimhamurthy *v.* Kantamma.
Appeals Nos. 395 of 1938 and 57 of 1939.

Hindu law—Will executed by a Hindu—Subsequent adoption—If to be deemed as revoking will.

A will cannot be deemed to have been revoked in law merely by reason of a subsequent adoption made by the testator during his lifetime and the legatee under the will is entitled to take the self-acquired properties of the testator bequeathed under the will. A bequest of a mortgage or debt under a will cannot be held to cover any property subsequently purchased out of the mortgage money realised by the testator nor can it cover even the mortgaged property purchased by him. Unless the language of the will be construed to be appropriate as applied to the state of things that existed at the date of the testator's death, the bequest of such mortgages and debts which have been realised must be regarded as of no effect.

V. V. Srinivasa Aiyangar and *B. Lakshminarayana* for Appellant.

P. Somasundaram, P. Suryanarayana and the Government Pleader for Respondents.

K.S.

Horwill, J.
21st November, 1941.

Oomayan, Accused.
Crl.R.C. No. 994 of 1941.
(Crl.R.P. No. 937 of 1941.)

Criminal Trial—Evidence—Foot-print expert—Evidence of—Value.

Experts in foot-prints are not recognised by the Evidence Act, but a Magistrate can take into consideration the evidence of a person who has seen a foot-print and taken the foot-prints of the accused and found that they are similar. But that evidence is not sufficient to bring home the offence to the accused in the absence of further knowledge regarding the differences between one foot and another.

A. S. Sivakaminathan for *A. V. Narayanaswami Aiyar* for Accused.

The Public Prosecutor (*V.L. Ethiraj*) on behalf of the Crown.

K.S.

Wadsworth, J.
21st November, 1941.

Venkatasubba Baghavathar *v.* Manager, L.F. Chatram, Tirukurugudi.
C.R.P. No. 724 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), S. 4 (c)—"Any other sum by way of loan or otherwise"—Whether to be construed ejusdem generis *with "tax or cess"—Rent due in respect of* chatram *estate managed by District Board—If falls under S. 4 (c).*

When rent is paid to the District Board as manager of a *chatram* Estate it is a payment to the District Board as such, of money which goes into the funds of the District Board, though earmarked for a particular purpose. The payment of rent in such circumstances would come within the category of "any other sum due to them by way of loan or otherwise", in S. 4 (c) of Act IV of 1938 and the exemption specified in that section will cover that liability even though it partakes of the nature of rent. It makes no difference whether the rent in question be an ordinary contractual rent or a rent governed by the special provisions of the Estates Land Act to bring it within the definition of rent under Act IV of 1938. I.L.R. 1940 Mad. 239, followed.

K. E. Rajagopalachariar for Petitioner.

S. Ramaswami Aiyar for Respondent.

K.S.

Kuppuswami Ayyar, J. Venkatasubba Rao *v.* Narasappa.
28th November, 1941. **S.A. No. 136 of 1940.**

Civil Procedure Code (V of 1908), O. 2, r. 2—Mortgage—Principal payable only on demand—Suit for interest—If bar to later suit for principal and subsequent interest.

Where under a mortgage it is provided that the principal is to be repaid on demand and the cause of action for the same had not arisen by reason of the fact that no demand had been made for it, the claim for the principal amount would be subsisting and interest for the subsequent period could be recovered by a later even though there had been a prior suit for recovery of interest accrued due till the date of such suit.

Ch. Raghava Rao and *A. Bhujanga Rao* for Appellant.

K. Umamaheswaram for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. Lakshmappa *v.* Venkata Reddi.
2nd December, 1941. **A.A.O. Nos. 606 and 607 of 1940.**

Provincial Insolvency Act (V of 1920), S. 75—"Order" holding that Court had jurisdiction to entertain applications under Madras Act IV of 1938 and posting them for trial on merits—If appealable, "order".

A decision upon jurisdiction has only the effect of regulating procedure and where it is not sufficient to dispose of the application hardly stands on a different footing from a ruling as to the admissibility of a document tendered or the relevancy of a question put and objected to in the course of the trial. Such decisions as to details of procedure and admissibility of evidence may, no doubt, be regarded as orders in a sense but it could not have been intended that such decisions should by themselves be open to appeal apart from the final decision disposing of the application or matter. Accordingly an order merely holding that the Court has jurisdiction to entertain applications for scaling down debts under Madras Act IV of 1938, in respect of debts due by an insolvent and posting the applications for trial on merits, is not appealable under S. 75 of the Provincial Insolvency Act.

K. Srinivasa Rao for Appellant.

V. S. Narasimhachar for Respondent.

K.S.

Burn, J. Lakshmanan Chettiar *v.* Periappan.
2nd December, 1941. **C.R.P. No. 1884 of 1941.**

Civil Procedure Code (V of 1908), S. 115 and O. 13, r. 2—Order allowing an application under O. 13, r. 2 for reception of documents after excusing delay—If open to revision as "a case which has been decided".

An order merely allowing an application under O. 13, r. 2 for reception of documents after excusing delay is not a "case decided" within the meaning of S. 115 of the Code of Civil Procedure and the order cannot be interfered with in revision.

N. G. Krishna Aiyangar for Petitioner.

B. Sitarama Rao and *T. K. Sundararaman* of Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. Venkataraju *v.* Ramabhaddirraju.
3rd December, 1941. **C.M.P. No. 7043 of 1941.**

Civil Procedure Code (V of 1908), O. 41-A, r. 6—Notice of appeal—If properly served by being left with the pleader for respondent—O. 3, r. 5—If applicable.

O. 3, r. 5 of the Civil Procedure Code is a general provision and O. 41-A is a special order relating to the procedure in appeals to the High Courts from

original decrees of Subordinate Courts. It must be inferred therefore that the special provisions of O. 41-A, in so far as they are in conflict with the provisions of the other parts of the Code must prevail and must govern the procedure relating to appeals in preference to the general provisions.

In view of the fact that r. 6 of O. 41-A excludes a notice of appeal from the category of processes which can be properly served by being left at the address for service of the party to be served the inference is that such a notice must be served regularly either on the respondent or on his advocate and that service by merely leaving in the office of the advocate as provided under O. 3, r. 5 is not service on the party or his pleader, for purposes of limitation for filing memorandum of cross objections under O. 41, r. 22.

P. Satyanarayana Rao, G. Chandrasekhara Sastri and *S. Venugopala Rao* for Petitioner.

K. Venkatarama Raju for Respondents.

K.S.

Kuppuswami Ayyar, J.
5th December, 1941.

Sekharan and others *v.* The Calicut Bank, Ltd., by Liquidators.
S.A. No. 1070 of 1940.

Hindu law—Applicability—Thiyyas—Decree against father—Executability against sons and joint family property—Sons constructive parties to decree and come within purview of S. 47—Appeal and not separate suit their proper remedy.

Thiyyas are governed by the Hindu law except where they are governed by customary law contrary to the rules of Hindu law. Where there is no proof of an absence of the right of compulsory partition in the community a decree obtained by a creditor against the father is binding on his sons who cannot dispute the liability for the decree debt and the proceedings against the joint family properties. The sons being constructive parties to the proceedings in execution against their father, their objections must come within the purview of S. 47, C. P. Code and not under O. 21, r. 58 and their proper remedy to rectify an unfavourable order is by appeal and not by separate suit.

P. Govinda Menon for Appellants.

John and *Row* for Respondent.

K.S.

Burn, J.
10th December, 1941.

Suryanarayanamurti Chowdary *v.* Chandramowli.
C.R.P. No. 2605 of 1941.

Madras Local Boards Act (XIV of 1920), Ss. 56 and 57—District Judge deciding questions under S. 57, a "Court"—Jurisdiction to decide all points arising under S. 56.

A District Judge deciding questions under S. 57 of the Madras Local Boards Act is a Court. S. 57 (2) gives the District Judge complete jurisdiction to decide all points that may arise under S. 56, such as whether a notice of a meeting was due notice or not. Even if his decision is wrong it will be only a wrong decision on a point of law not affecting the jurisdiction of the Judge but affecting the disqualification or otherwise of a member. Accordingly such an order is not liable to be revised under S. 115 of the Civil Procedure Code.

V. Govindarajachari for Petitioner.

V. Subramaniam for Respondent.

K.S.

[END OF VOLUME, 1941—II.]